

CONFIRMATION HEARING ON DONALD B.  
VERRILLI, JR., OF CONNECTICUT, NOMINEE TO  
BE SOLICITOR GENERAL OF THE UNITED  
STATES; VIRGINIA A. SEITZ, OF VIRGINIA,  
NOMINEE TO BE ASSISTANT ATTORNEY GEN-  
ERAL, OFFICE OF LEGAL COUNSEL, U.S. DE-  
PARTMENT OF JUSTICE; AND DENISE E.  
O'DONNELL, OF NEW YORK, NOMINEE TO  
BE DIRECTOR, BUREAU OF JUSTICE ASSIST-  
ANCE, U.S. DEPARTMENT OF JUSTICE

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HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

—————  
MARCH 30, 2011  
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**Serial No. J-112-13**  
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Printed for the use of the Committee on the Judiciary



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OF VIRGINIA, NOMINEE TO BE ASSISTANT ATTORNEY GENERAL, OFFICE OF  
LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE; AND DENISE E. O'DONNELL,  
OF NEW YORK, NOMINEE TO BE DIRECTOR, BUREAU OF JUSTICE ASSISTANCE,  
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**DONALD B. VERRILLI, JR., OF CONNECTICUT,  
NOMINEE TO BE SOLICITOR GENERAL OF  
THE UNITED STATES; VIRGINIA A. SEITZ, OF  
VIRGINIA, NOMINEE TO BE ASSISTANT AT-  
TORNEY GENERAL, OFFICE OF LEGAL  
COUNSEL, U.S. DEPARTMENT OF JUSTICE;  
AND DENISE E. O'DONNELL, OF NEW YORK,  
NOMINEE TO BE DIRECTOR, BUREAU OF  
JUSTICE ASSISTANCE, U.S. DEPARTMENT OF  
JUSTICE**

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**WEDNESDAY, MARCH 30, 2011**

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Committee met, pursuant to notice, at 2:34 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Sheldon Whitehouse, presiding.

Present: Senators Whitehouse, Leahy, Schumer, Klobuchar, Franken, Coons, Blumenthal, Grassley, Sessions, Hatch, and Lee.

**OPENING STATEMENT OF HON. SHELDON WHITEHOUSE, A U.S.  
SENATOR FROM THE STATE OF RHODE ISLAND**

Senator WHITEHOUSE. The hearing will come to order. We will this afternoon be considering three nominations to key posts in the Department of Justice, and just before I make a few opening remarks, I want to let everybody know what the order of proceeding is going to be.

After my statement I will recognize the Ranking Member, the distinguished Senator from Utah, Mr. Hatch, Orrin Hatch, for his opening remarks, and then we will go to the Senators who have introductions to make of the nominees. The first will be Senator Schumer, who will introduce Denise O'Donnell, the nominee to be the Director of BJA. Then we will go to Senator Carper and Senator Coons of Delaware, who will introduce Virginia Seitz, who is the nominee to be the Assistant Attorney General for OLC. And then Senator Blumenthal will have the opportunity to introduce Don Verrilli, who is the nominee to be Solicitor General. Then they will come forward, and we will proceed with the hearing.

We in Congress and the American people have tasked our Department of Justice with very weighty responsibilities: protecting the Nation against national security threats, preventing and pun-

ishing crime, and ensuring the fair administration of justice. The Department must defend both our constitutional rights and our safety. It must balance its substantial authority with strict adherence to the rule of law.

The Senate is given a key role in ensuring that the Department meets its great responsibilities. We must provide the Department of Justice with the tools and resources it needs to fulfill its vital mission, and we must make sure that the Attorney General of the United States has the core group of leaders in place to enable him or her to perform the Department's responsibilities effectively.

Unfortunately, the Senate recently has lagged in the latter regard. The Deputy Attorney General is a key operational leader within the Department of Justice, but the current nominee has been denied a vote for almost 1 year. I do understand that lifetime judicial appointments have given rise to political disputes. But I hope that the operational needs of the Justice Department are not subjected to obstruction and delay. I certainly hope we will keep that concern in mind as we consider the three nominees before us today.

The first, Donald B. Verrilli, Jr., has been nominated by the President to be Solicitor General of the United States. As we all know, the Solicitor General has the privilege to represent the United States in the Supreme Court. For that reason, a Solicitor General must be a lawyer of the highest intellect and character. Mr. Verrilli clearly meets this bar. He is among our Nation's most respected and experienced appellate advocates, having argued 12 cases at the Supreme Court and participated as counsel in 22 more. Mr. Verrilli currently serves as Deputy Counsel to the President and previously served as Associate Deputy Attorney General in the Department of Justice. He spent over 20 years in private practice, and he clerked on the Supreme Court early in his legal career. His remarkable record prepares him well to serve as our Nation's next great Solicitor General.

The Office of Legal Counsel, another of the Department's most important institutions, provides authoritative legal advice to the President and to executive agencies. As my colleagues know, I believe very strongly that the office betrayed its historic high standards during the previous administration. We need not relitigate those failings today, nor need we retread the ground of the nomination of Dawn Johnsen, which I believe was unfairly blocked. But I do hope that we will all keep in mind the high standards that the Office of Legal Counsel historically has achieved and the urgent need to adhere to those standards going forward.

I have every expectation that Virginia Seitz, the President's nominee to lead the OLC, will honor those standards. She is a brilliant lawyer. In over 20 years of practice, she has worked on more than 100 Supreme Court briefs and hundreds of filings in lower courts, representing a wide range of clients. A Rhodes Scholar, she too clerked on the Supreme Court.

Our final nominee, Denise E. O'Donnell, has been nominated to be the Director of the Bureau of Justice Assistance. The BJA supports law enforcement initiatives that strengthen our Nation's criminal justice system and coordinates important departmental grant programs, including the Bulletproof Vest Partnership Pro-

gram, drug courts, the Byrne/JAG program, Federal assistance to State prescription drug monitoring programs, and the Prisoner Re-entry Initiative. Ms. O'Donnell comes before the Committee with a remarkable record of service in law enforcement leadership in New York State, most recently as Deputy Secretary for Public Safety. And as I mentioned to her earlier, she enjoys the strong support of Manhattan District Attorney Vance.

I am glad to welcome such a qualified group of nominees to the Committee, and I look forward to their testimony, but first to the remarks of our distinguished Ranking Member, Senator Hatch.

**STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH**

Senator HATCH. Well, thank you, Mr. Chairman. I am glad to assist the distinguished Ranking Member, Senator Grassley, and, of course, you, Mr. Chairman, in filling in today.

I want to welcome the three nominees before us each of whom is nominated to head a key component of the Department of Justice. The Bureau of Justice Assistance, for example, provides a bridge between the State and Federal Governments in helping law enforcement. Ms. O'Donnell, I note that you received your undergraduate degree from Canisius College in Buffalo. One year ago yesterday, I was privileged to deliver the Raichle Lecture on Law in American Society at Canisius, which has a strong and innovative pre-law center. Welcome to the Committee.

Ms. Virginia Seitz has been nominated to head the Office of Legal Counsel. She has the extensive private practice experience that the previous nominee lacked and, frankly, does not appear to have the extreme ideological baggage that many felt the previous nominee carried. She also has strong support among prominent lawyers from across the political spectrum. In fact, one of them is my former chief of staff who caught me on the way in to make sure that you are treated very well. And I intend to do that.

[Laughter.]

Senator HATCH. In spite of Senator Schumer, I intend to.

She also has strong support among prominent lawyers from across the political spectrum. My hope is that this more balanced background of legal experience and broad-based support will make her a more suitable nominee to this position.

Mr. Donald Verrilli also has extensive courtroom experience and comes highly recommended by many distinguished leaders in the legal profession, both liberal and conservative. His nomination might not have been controversial at all had the Obama administration not recently abandoned its duty to defend the constitutionality of the Defense of Marriage Act. Previous Solicitor General nominees of both parties have affirmed the duty of defending Congress' statutes if reasonable arguments can be made. With very rare exceptions that do not apply to the Defense of Marriage Act, if a reasonable argument can be made, then that reasonable argument must be made. Once a law is enacted, that is the Department of Justice's duty.

A statute like the Defense of Marriage Act does not suddenly become unconstitutional simply because the President's party does not like. The Department's duty is not limited to making what it

considers the best legal arguments or the safest legal arguments or legal arguments that send messages to its political base. The Department's duty is to make any reasonable argument that can be made.

Reasonable arguments certainly can be made that the Defense of Marriage Act is constitutional. How do I know this? Well, because this very same Justice Department has already made them in court and has even offered to make them again. In my view, the administration has abandoned its duty to Congress in order to do a political favor for a political constituency. As a result, this will be an issue in the context of Mr. Verrilli's nomination. However, I intend to treat Mr. Verrilli very fairly, as I always try to do, and I have great respect for him.

Mr. Chairman, I will not take any more time so we can hear the nominees and ask various questions. Thank you.

Senator WHITEHOUSE. Thank you, Senator Hatch.

I am going to depart briefly from the schedule that I announced at the beginning because the distinguished Ranking Member of the Committee, and not just today's co-chair, is here. Senator Grassley is our Ranking Member and would like to offer an opening statement, and I will very gladly accommodate his wish.

Senator GRASSLEY. I have a very long opening statement, so I am just going to refer to part of it.

Senator WHITEHOUSE. The entire statement will be admitted into the record with unanimous consent.

**STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR  
FROM THE STATE OF IOWA**

Senator GRASSLEY. The task of the Office of Solicitor General is to supervise and conduct Government litigation in the Supreme Court. Virtually all such litigation is channeled through the Office of Solicitor General and is thereby conducted by the office. The United States is involved in approximately two-thirds of the cases before the Supreme Court, so this is a very important position.

Mr. Verrilli is nominated to be Solicitor General of the United States. He is not the President's Solicitor General nor the Solicitor General for the Department of Justice. The Solicitor General must be an independent voice within the administration. That means courage and willingness to defend all the laws and the Constitution of the United States regardless of the politics of the moment. And this is particularly important given the President's announcement that he would not defend the Defense of Marriage Act.

Likewise, the Assistant Attorney General heading the Office of Legal Counsel must also be an independent and non-political voice. I will not describe the duties of the office, but I want to highlight the delegation from the Attorney General that this official provides authoritative advice to the President. The Office of Legal Counsel drafts legal opinions for the Attorney General and also provides its own written opinion and oral advice in response to requests from the Counsel to the President.

The office is also responsible for providing legal advice to the executive branch on all constitutional questions and reviewing pending legislation for constitutionality. In performing these duties, the

Assistant Attorney General heading this office must do so without regard to political pressure.

I would note that this office has not had a Senate-confirmed person since Jack Goldsmith, confirmed October 2003. Upon his departure, the President nominated Mr. Bradbury in June of 2005 to fill the vacancy, and there was a hearing soon afterwards, reported out of Committee November 2005. Mr. Bradbury waited more than 3 years for Senate approval, which never came. President Obama's first nominee for this position was Dawn Elizabeth Johnsen. Her nomination was controversial, and was eventually withdrawn by the President.

The third office for which we are considering a nominee is the Bureau of Justice Assistance, a component of the Office of Justice Programs within the Department of Justice. I would like to emphasize that the policy, programs and planning which this office administers must be accomplished in a nonpartisan fashion. This office supports law enforcement and our Nation's criminal justice system. It is essential that this office promote local control of law enforcement and is fairly and officially administering grant programs.

Two of the nominees—Ms. Seitz and Ms. O'Donnell—graduated from the same law school. Ms. Seitz and Mr. Verrilli each clerked on the same Court. Both clerked for Justice Brennan. I commend each of the nominees for their prior public service, and I will put the rest of my statement in the record.

[The prepared statement of Senator Grassley appears as a submission for the record.]

Senator WHITEHOUSE. Thank you, Senator Grassley.

To introduce his home State nominee, Senator Schumer.

**PRESENTATION OF DENISE O'DONNELL, NOMINEE TO BE DIRECTOR, BUREAU OF JUSTICE ASSISTANCE, U.S. DEPARTMENT OF JUSTICE, BY HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK**

Senator SCHUMER. Thank you, Mr. Chairman, and I am really honored to introduce one of the most dedicated and talented public servants the State of New York has to offer: Denise O'Donnell.

The job of managing the Bureau of Justice Assistance is like taking a thousand points of light and making sure they all stay lit. Police officers, judges, victims of crimes, counselors, and a host of others who are involved in the criminal justice system every day depend on the grants and the expertise that comes from BJA to keep cops on the beat and communities safe. This job is even more challenging today when everyone has to figure out how to do more with less.

Now, I have known Denise and her wonderful family for a long time—first, as the very accomplished and respected U.S. Attorney for western New York where we teamed up to launch Project Exile, a very successful effort to address the scourge of illegal crime guns; and then later in private practice where we worked together—she was in private practice; I was not; I never have been—on a number of issues related to New York's school boards. She went on to compete for public office and then served, to universal acclaim, as a New York State Criminal Justice Commissioner. So she has plenty of experience, and she is a nonpartisan, on-the-merits person, the

kind of person Senator Grassley mentioned. I am sure that when you look at Denise O'Donnell's history, you will see that she confirms that.

Denise is deeply committed to public service and the impartial, enlightened administration of justice. In short, there could be no one better suited to this job than Denise O'Donnell. She served as a lawyer, prosecutor, executive-level manager, policymaker, and professional social worker. She has dedicated her career to improving the judicial system in our State, and after she is confirmed, she will do the same thing for the country.

She is a native of Buffalo. She is the oldest of six children, a graduate of Mount St. Joseph Academy High School. She was a member of the first class that graduated women in the formerly all-male Jesuit school, Canisius College, of which we are all very proud in the western New York area.

She went on to earn a master's degree in social work and a J.D. summa cum laude from SUNY at Buffalo. After joining the U.S. Attorney's Office in the Western District, she rose to become the first Assistant U.S. Attorney and was appointed to be the U.S. Attorney for that office, the first woman for that position. During that time she served as the Vice Chair of the Attorney General's Advisory Committee. Among other significant cases, she helped bring Timothy McVeigh to justice.

After she left office, she worked in one of the State's oldest law firms, Hodgson Russ. Before returning to public service as the Commissioner of the New York State Division of Criminal Justice, where she oversaw a \$64 million operating budget, \$86 million in local assistance, and \$67 million in Federal criminal justice assistance, she ran programs too numerous to list, but they included the State's first DNA data bank, the sex offender registry, and State and local re-entry task forces. She has a long and accomplished resume, so I will ask unanimous consent that my entire statement be read in the record, but just one more mention. She held the post of Deputy Secretary of Public Safety, managed 12 public safety agencies, a budget of \$4.7 billion, oversaw a portfolio of 11 homeland security and criminal justice agencies, including the Division of Criminal Justice Services, Office of Homeland Security, and Division of the State Police and Department of Corrections. Forty thousand employees, about 19 percent of the State's workforce was under Denise's jurisdiction. She now serves on the New York State Justice Task Force to Prevent Wrongful Convictions in the Criminal Justice Council of New York.

Mr. Chairman and my colleagues, I know Denise well. She is just a superlative public servant, a superlative human being, and I think that she will meet the satisfaction of everyone on this Committee because she is, again, an on-the-merits public servant, and I ask unanimous consent that the rest of my statement be read into the record.

Senator WHITEHOUSE. Without objection, the rest of your statement will be in the record.

[The prepared statement of Senator Schumer appears as a submission for the record.]

Senator WHITEHOUSE. Also without objection, a statement on the nomination of Denise O'Donnell by Senator Kirsten Gillibrand will

be in the record. She could not be here, but her statement is both warm and enthusiastic in support of this candidate.

[The prepared statement of Senator Gillibrand appears as a submission for the record.]

Senator WHITEHOUSE. To introduce our next nominee, we have Senator Carper and Senator Coons of Delaware. Senator Carper, would you proceed?

**PRESENTATION OF VIRGINIA SEITZ, OF DELAWARE, NOMINEE TO BE ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE, BY HON. THOMAS R. CARPER, A U.S. SENATOR FROM THE STATE OF DELAWARE**

Senator CARPER. Thanks so much, Mr. Chairman, Senators Hatch and Grassley and our colleagues. Thank you for this opportunity, especially to my colleague Senator Coons.

To the folks in the audience, it is not uncommon for people from the same home State of a nominee to be here to introduce him, and we are happy to do that—and in some cases, very happy to do it. For me, given the nominee that the President has submitted for this position of Assistant Attorney General for the Office of Legal Counsel, for me it is a privilege, just a great privilege, and I am humbled to be here to introduce Virginia Seitz. The President has made not just a wise choice in nominating Virginia Seitz for this position, but I think he had made an extraordinary choice, and I am delighted to be here to say so.

In case anybody is wondering who Virginia Seitz is, she is right here over my right shoulder, and she is sitting next to a couple of young guys. One of these guys is—both are named Roy. One of them is her husband, and I think the younger one is her son, who is a 10th grader, I think, at the Field School, and Roy is her husband. I just want to say thanks to both of the Roys for your willingness to share your mom and your wife with the people of our country.

I think we are fortunate as a Nation that someone with Virginia's outstanding credentials has stepped forward to do this important work. Her education, her background, and her experience are superbly suited for this position. I like to kid her. I said when she could not get into the University of Delaware as an undergraduate, she did manage to get into Duke and graduated only summa cum laude with a Bachelor of Arts degree. After that she went off to England where she studied at Oxford and was awarded a Rhodes scholarship there, and later on her law degree from the University of Buffalo. There is a little Buffalo thing going on here if you listened to Senator Schumer's introduction. But Virginia Seitz graduated first in her law school class at the University of Buffalo.

She went on from there to clerk for one of the judges here on the D.C. Circuit Court of Appeals, a fellow by the name of Harry Edwards, and then later, as I think has been mentioned, as a clerk for U.S. Supreme Court Justice William Brennan.

Currently she is a partner at the law firm of Sidley Austin right here in Washington, D.C. She is one of the Nation's leading appellate litigators. With over 20 years of litigation experience, Virginia

Seitz has hundreds of briefs and petitions for Federal courts, and someone else mentioned, I think, more than 100 briefs in the Supreme Court alone.

Aside from her professional experience, Virginia Seitz is a person of extraordinary integrity and character. What do they say about integrity? If you have it, nothing else matters. If you do not have it, nothing else matters. And she is a person of extraordinary integrity.

She is joined today, as I said earlier, by several members of her family, including her husband Roy, her son Roy, and one of her three brothers is here. You have two other brothers, right? Yes. And one of her three brothers is here, and his name is C.J. Seitz. He is sitting immediately behind Virginia. He is one of the outstanding attorneys in the State of Delaware. He is someone we are just extraordinarily proud of as well.

But Virginia is proud of her family's deep roots in our State. Her father, C.J. Seitz, attended the University of Delaware and then obtained his law degree from the University of Virginia. C.J. Seitz served as vice chancellor of our State, he served as chancellor for our State, the Court of Chancery. He served also for about 20 years on the Delaware bench and then joined the Third Circuit Court of Appeals. He was very much involved as a chancellor in some of the civil rights legislation—litigation, rather, of the 1950's.

As Virginia has said of her dad, he was a great man, and I know he is very proud of his daughter today, and his son—sons, actually. I too am proud to have the privilege of introducing someone from my State, from our State, who has done and will continue to do, I believe, just extraordinary service for our Nation. With her legal background and acumen, her tireless work ethic, and her experience as a Federal litigator, Virginia Seitz is more than qualified to serve as Assistant Attorney General for the Office of Legal Counsel.

I just want to say I was privileged to serve as Governor for a while and got to nominate a lot of people to serve as judges, and she has all the qualities of anybody I ever looked for in that. The other thing I especially love about her, and, frankly, her family, from her dad and mom, C.J., her brother, these are people who are committed to figuring out the right thing and to doing it. These are folks who believe in the Golden Rule, treat other people the way they want to be treated. These are folks who focus on doing things well. As I like to say, if it is not perfect, make it better. They just focus on excellence. And the last thing is just they do not give up. They are hard-working family, really a great work ethic, and she is someone who I think will make us all proud. I am happy to commend her to you for your consideration, and thank you for this opportunity.

Senator WHITEHOUSE. Thank you, Senator Carper.

Now, Senator Coons.

**PRESENTATION OF VIRGINIA SEITZ, OF DELAWARE, NOMINEE TO BE ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE, BY HON. CHRISTOPHER A. COONS, A U.S. SENATOR FROM THE STATE OF DELAWARE**

Senator COONS. Thank you, Senator Whitehouse, and I am pleased today to join the senior Senator from Delaware, Tom Carper, in introducing Virginia Seitz to the Committee and urging her consideration. Ms. Seitz is nominated, as you have heard, to be the Assistant Attorney General for the Office of Legal Counsel, and as head of OLC, she will be the top administration lawyer tasked with the mission of providing the President and executive agencies with legal advice that is thorough, accurate, insightful, and free of political expediency. And for this demanding job, I am proud that President Obama has selected both such an exemplary candidate and a Delawarean.

Ms. Seitz was born and raised in Wilmington, Delaware, and there she and her three brothers attended the same high school, Tower Hill, as I did. I was a contemporary of one of her brothers, Steven, and I am proud to call another of her brothers, C.J., who joins us here today and is an outstanding member of the Delaware bar, my personal friend.

As you heard from Senator Carper, Ms. Seitz hails from a very distinguished Delaware family. I had the privilege of meeting Justice/Judge/Chancellor Seitz who served for 20 years in Delaware's Court of Chancery when he was on senior status in the Third Circuit, and he helped build the unparalleled national reputation of our Court of Chancery. But more than anything, he showed wisdom, judgment, and fairness in the landmark case of *Parker v. University of Delaware*. Judge Seitz, although well known in Delaware, I think is not nationally heralded as much as he should be for being the first to order desegregation, to overturn legal segregation in our State.

A later case, *Belton v. Gebhart*, was the one part case of *Brown v. Board* that was affirmed by the Supreme Court, that landmark case that once and for all ended legal segregation in the United States.

From her childhood in Delaware, Ms. Seitz, who I think learned a great deal about principles and legal reasoning from her father, went on, as you heard, to attend Duke, Oxford, and Buffalo Law School, has spent time both in prestigious clerkships here with Judge Edwards and Justice Brennan, but in my view, more importantly than anything else, has a private practice career that spans 20 years. As an appellate attorney, she has become an expert in labor and employment law, a field where she has published many articles, spoken before many groups, including the Federalist Society.

She is a distinguished appellate advocate and has worked on, as you heard, more than 100 Supreme Court briefs and for the several years has taught a course in practical Supreme Court advocacy at Northwestern, which allows students to learn from attorneys on cases they are preparing to argue before the Supreme Court.

Ms. Seitz, with whom I had a chance to visit before this hearing, is universally respected as an outstanding attorney. She is a law-

yer's lawyer. She has argued on both sides of civil rights cases. She has, in my view, no ideological agenda, and she has support from both sides of the aisle, including gentlemen such as Ted Olson, Jack Goldsmith, and Steven Bradbury, all of whom are known to members of this Committee and who served as the head of OLC under previous Republican Presidents.

In 2003, Ms. Seitz worked on a case that allowed her to honor the outstanding legacy of her father's early desegregation decisions. She appeared as counsel in the case of *Grutter v. Bollinger* and successfully defended the University of Michigan Law School's admission system, which sought to achieve diversity within the student population along a very broad range of factors, including racial diversity among them.

Although she lives in Washington today, Ms. Seitz remains a Delawarean at heart, by birth as well as by choice, and last year, just to reaffirm that, filed a petition for a writ of certiorari with the Supreme Court on behalf of our State in a dispute with some professional sports league over some State sports lottery that really probably only interested Delawareans.

Let me close with this, if I might. If confirmed, Ms. Seitz will bring, in my view, greatly needed stability in leadership to OLC, which has, unfortunately, been beset by controversy and has not had a Senate-confirmed department head since 2004. I am confident that Ms. Seitz will bring to this office that perfect balance of intelligence, thoughtfulness, and an absolute lack of partisanship that will serve the Office of Legal Counsel well and will serve our Nation as well.

I am honored to join our senior Senator in urging her consideration by the Committee. Thank you.

Senator WHITEHOUSE. Thank you, Senator Coons.

And for our final introduction of his home State nominee, the Senator from Connecticut, Senator Blumenthal.

**PRESENTATION OF DONALD B. VERRILLI, JR., NOMINEE TO BE SOLICITOR GENERAL OF THE UNITED STATES, BY HON. RICHARD BLUMENTHAL, A U.S. SENATOR FROM THE STATE OF CONNECTICUT**

Senator BLUMENTHAL. Thank you, Mr. Chairman. I am very privileged and honored to introduce to this panel Donald B. Verrilli, Jr., who is the President of the United States' nominee to be Solicitor General of the United States, one of the most important positions in the system of justice and also in the U.S. Government, and he is here today with Gale Laster, who is his wife, and they have a 19-year-old daughter. I am not sure whether she is here today—she is not here. But I am sure she and Ms. Laster are very proud of Mr. Verrilli's many accomplishments, which more than fully qualify him to be in this position.

He happens to be a Connecticut native—well, almost. He was born in New Rochelle, New York, right across the border, and then grew up in Wilton, Connecticut, where his mother was the first selectman of Wilton, I believe, from 1979 to 1985, by happenstance a Republican first selectman and, I know from my own experience, a very able first selectman, the chief local official of that town.

Mr. Verrilli graduated from Wilton High School in 1975. He went on to attend Yale University, graduated in 1979 with a B.A. in history, and he then attended Columbia Law School, where he served as editor-in-chief of the Columbia Law Review. He served as a law clerk to Judge Skelly Wright of the United States Court of Appeals for the D.C. Circuit and then to Justice William Brennan of the United States Supreme Court.

Mr. Verrilli has spent much of his career in private practice with over 20 years of litigation experience at the Washington, D.C. office of Jenner & Block, where he has focused on telecommunications, intellectual property law, First Amendment, copyright, a wide variety of subject matter, a lot of it at the highest levels of appellate practice with many briefs before the United States Supreme Court as well as the appellate courts and many personal arguments there. But he has also done a wide variety of pro bono litigation, representing, for example, Teach for America and the judges of the superior court of the District of Columbia.

It is very important to understand what the Solicitor General does. He serves as the President's principal advocate in the United States Supreme Court, indeed, the United States' principal advocate, and Mr. Verrilli is superbly qualified for that role. He not only has chaired or co-chaired Jenner & Block's Supreme Court practice group from 2000 until his departure from the firm in 2009, but he has participated in more than 100 cases before the Supreme Court, including arguments in 12 such cases. He has participated in about 90 cases before the United States Court of Appeals and the State supreme courts, arguing himself over 30 of those appeals. So he is an expert appellate litigator who has attained really the height of professional excellence throughout his impressive career.

He has also served in the U.S. Government. He left his private practice in 2009 to join the Department of Justice as an Associate Deputy Attorney General where he served with distinction. He focused on domestic and national security policy issues, and he then moved to the White House, where he currently serves as Deputy Counsel to the President. So I think we all join in respecting and thanking him for his service to the country so far, as well as his willingness to undertake this new responsibility.

Mr. Verrilli is not a judicial nominee. He will not be fulfilling a judicial role as an independent decisionmaker weighing both sides and then reading the law. He will be an advocate. His role as Solicitor General is to be an advocate for the President, but also he is an official charged with responsibility as an officer of the United States Supreme Court to advise that Court as well. And having argued side by side with the Solicitor General and having watched the United States Solicitor General in many cases advise the Court, he has a place of distinction unmatched by any private advocate before that Court. So someone of this distinction and background and expertise is an important resource to the United States Supreme Court.

I would hope that his distinctions and his qualifications will not be combined with a fight over political disagreements or even with disagreements with him on particular issues. I have to confess, having gone through in some detail his record of arguments, I might disagree with him on some of the positions that he has taken

as an attorney, as an advocate, before the United States Supreme Court. But the reason that he is endorsed by so many members of the Supreme Court bar is that he is superbly qualified and he has conducted himself with distinction throughout his career.

As I am sure my colleagues know, he has been endorsed by many of the recent attorneys who have served in the position of Solicitor General in both Republican and Democratic administrations, including Charles Freed, Kenneth Starr, Drew Days, Walter Dellinger, Seth Waxman, Ted Olson, Paul Clement, Gregory Garre. And I think those endorsements really confirm the view that he is qualified for this position, and I recommend him very heartily to my colleagues.

Thank you very much, Mr. Chairman.

Senator WHITEHOUSE. Thank you very much, Senator Blumenthal.

It should probably be a matter of record before this Committee in this nomination that the opinions of Senator Blumenthal regarding appellate advocacy are not without a very significant foundation. If I am not mistaken, Senator Blumenthal has argued three or four times himself before the United States Supreme Court as Attorney General of Connecticut, in addition to presumably innumerable appearances before the State supreme court and the circuit court of appeals. So he knows whereof he speaks when he talks of talented appellate advocacy.

Senator BLUMENTHAL. Thank you very much, Mr. Chairman. I hope those very kind words will add some weight to my recommendation, but I think this nominee really stands on his own.

Senator WHITEHOUSE. As we conclude the introductions, I want to add into the record some of the letters of support that we have received. We have a letter of support from the nomination of Donald Verrilli to be Solicitor General from eight former Solicitors General from both Republican and Democratic administrations, including Charles Freed, Kenneth Starr, Ted Olson, Paul Clement, and Gregory Garre, who explain that they are all familiar with his work, his demeanor, and his well-deserved reputation as a leading member of the Supreme Court bar, and conclude that Mr. Verrilli is "ideally suited to carry out the crucial tasks assigned to the Solicitor General and to maintain the traditions of the Office of the Solicitor General." And I will enter that letter into the record, without objection.

[The letter appears as a submission for the record.]

Senator WHITEHOUSE. We also have another letter from over 50 Supreme Court practitioners, including Miguel Estrada, Peter Keisler, and Maureen Mahoney, who all the signatories of that letter describe themselves as lawyers who are deeply familiar both with the work of the Solicitor General and with Don's own work and character. And they concluded that, I quote, "Don is ideally suited to carry out the crucial tasks assigned to the Solicitor General, chiefly the representation of the United States in the Supreme Court, and to maintain the traditions of the office that the Solicitor General leaves." They "urge the Senate to confirm him as Solicitor General," and I ask that their letter also be entered into the record, without objection.

[The letter appears as a submission for the record.]

Senator WHITEHOUSE. And, finally, the general counsels of, I think, 29 different major American corporations from Booz Allen and GE to Bechtel and Viacom, to Exelon and Fidelity, Ford Motor Company, Northrop Grumman, Sony, Intel, Verizon, Microsoft, Google, Warner Brothers—a wide variety—have also written a letter of support that, without objection, I would like to add to the record.

[The letter appears as a submission for the record.]

Senator WHITEHOUSE. Then we also have a number of letters that I would like to add to the record on behalf of Virginia Seitz: first, a letter of support from Peter Keisler, who is the former Assistant Attorney General for the Civil Rights Division and the former Acting Attorney General, therefore somebody knowledgeable about the Department and OLC, under President George W. Bush. In his letter, Mr. Keisler writes that, “I believe the President has made an inspired choice.” He describes Ms. Seitz as having an unusually sophisticated understanding of the law and legal plannings and a way of relating particular doctrines and rules to the law’s underlying methods and purposes that reflects not only her extensive knowledge but also, and more fundamentally, a deep appreciation and respect for our distinctive legal tradition. And, without objection, I will add that to the record.

[The letters appears as a submission for the record.]

Senator WHITEHOUSE. Maureen Mahoney is a former Deputy Solicitor General and a well-regarded appellate lawyer. She writes of Ms. Seitz: “Despite our political differences, I am an ardent admirer of Virginia Seitz and strongly support her nomination.” She notes, “Virginia is not blinded by ideology. She knows how to be assertive without being aggressive, and she can bridge differences with insight and diplomacy. She also belongs to that rare breed of lawyers who are both brilliant and exceedingly modest.”

We can probably stipulate that that is a rare breed.

[Laughter.]

Senator HATCH. So stipulated.

Senator WHITEHOUSE. And there are a considerable number of other letters of support that I will ask be added to the record of these proceedings, without objection.

[The letters appears as a submission for the record.]

Senator WHITEHOUSE. And that being accomplished, if I could ask the nominees to step forward and be sworn, I would appreciate it.

Please raise your right hand.

Do you affirm that the testimony you will give before this Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. VERRILLI. I do.

Ms. SEITZ. I do.

Ms. O’DONNELL. I do.

Senator WHITEHOUSE. Thank you. Welcome and please be seated.

Why don’t we just go right across the panel and begin with Mr. Verrilli. If you have a statement of any kind that you would like to make, now is your chance to make it, and we find that many of our nominees also take this opportunity to introduce their family

and friends who are present and commit their presence to posterity through the good auspices of C-SPAN.

[Laughter.]

Senator WHITEHOUSE. So if you would like to do that, we would be very pleased for you to take that opportunity.

**STATEMENT OF DONALD B. VERRILLI, JR., NOMINEE TO BE  
SOLICITOR GENERAL OF THE UNITED STATES**

Mr. VERRILLI. Thank you, Senator Whitehouse. I would like to begin, if I might, by introducing my wife, Gail Laster, who is, in addition to being a wonderful mother for our 19-year-old daughter, Jordan—who is starting her spring term this week as a freshman at Dartmouth, and that is why she is not here—she is a distinguished lawyer and public servant in her own right, having served as counsel on this Committee, having served as general counsel at the Department of Housing and Urban Development from 1997 to 2001, and currently as chief housing counsel for Ranking Member Frank on the House Financial Services Committee.

And, in addition, I would like to introduce my brother-in-law, Joseph Wayland, who is here today with his son, Christopher. Joe is currently in public service as the Deputy Assistant Attorney General for Antitrust in the Department of Justice, having left a long career in private practice to take up that obligation.

I have an opening statement which, with your permission I would submit for the record.

Senator WHITEHOUSE. Without objection.

Mr. VERRILLI. I would like, if I could, to just say a few words by way of introduction.

Senator WHITEHOUSE. Please.

Mr. VERRILLI. I feel sitting here today a sense of profound gratitude—gratitude to my wife, Gail, for her love and position, gratitude to my parents, who are not here today but I think are huddled around a laptop watching the webcast of this proceeding, and so I do want to take this occasion to thank them for teaching me through the example of their own lives the fundamental importance of the values of dedication and integrity and decency and kindness, and most importantly, the invaluable lesson that so much more can be accomplished by bringing us together than through division.

Of course, I also want to thank the President and am profoundly grateful to the President for the confidence he has shown in me with this nomination. I want to thank the Attorney General for his strong support, and I want to thank this Committee for the hearing today and taking the time to consider my nomination.

I understand the weighty responsibilities and traditions of the Solicitor General's office, and if I am fortunate enough to be confirmed, I will do everything in my power to live up to the high standards of professionalism, independence, and integrity that have been set by Rex Lee and Seth Waxman and Ted Olson and the other Solicitors General who have served with such distinction during my time as a lawyer, as well as their illustrious predecessors.

I fully understand that our Nation's commitment to the rule of law requires that the Solicitor General uphold those high stand-

ards, and I am humbled at the opportunity to take on that challenge.

Thank you.

[The biographical information of Mr. Verrilli follows.]

UNITED STATES SENATE  
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR NON-JUDICIAL NOMINEES

PUBLIC

1. **Name:** State full name (include any former names used).  
  
Donald Beaton Verrilli, Jr.
2. **Position:** State the position for which you have been nominated.  
  
Solicitor General of the United States
3. **Address:** List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.  
  
Office of the White House Counsel  
The White House  
Washington, DC 20500
4. **Birthplace:** State date and place of birth.  
  
1957; New Rochelle, NY
5. **Education:** List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.  
  
Columbia University School of Law, August 1980 – May 1983, J.D. May 1983  
Yale University, September 1975 – May 1979, B.A. May 1979  
Syracuse University in Florence, Italy, September – December 1977 (no degree)
6. **Employment Record:** List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or description.  
  
Office of the White House Counsel  
The White House  
Washington, DC 20500  
February 2010 – present  
Deputy Counsel to the President (June 2010 – present)  
Senior Counsel to the President (February – May 2010)  
  
United States Department of Justice  
950 Pennsylvania Avenue N.W.  
Washington, DC 20530

February 2009 – January 2010  
Associate Deputy Attorney General

Jenner & Block  
1099 New York Avenue N.W.  
Washington, DC 20001  
(while at Jenner & Block, I served as an officer of the Bruce J. Ennis Foundation and was involved in selecting recipients of the Bruce J. Ennis Fellowship for First Amendment Law)  
July 1988 – January 2009  
Partner (January 1991 – January 2009)  
Associate (July 1988 – December 1990)

Georgetown University Law Center  
600 New Jersey Avenue N.W.  
Washington, DC 20001  
Spring semesters: 1992 – 2008, except 2005  
Adjunct professor of law

American University Washington College of Law  
4801 Massachusetts Avenue N.W.  
Washington, DC 20016  
Spring semester 1995  
Adjunct professor of law

Office of the White House Counsel  
The White House  
Washington, DC 20500  
May 1994 – July 1994  
Special Counsel to the President

Ennis Friedman & Bersoff  
1200 Seventeenth Street N.W.  
Washington, DC 20036  
September 1986 – June 1988  
Associate

Columbia University School of Law  
435 West 116<sup>th</sup> Street  
New York, NY 10027  
September 1985 – August 1986  
Samuel Rubin Research Fellow

Supreme Court of the United States  
One First Street N.E.  
Washington, DC 20543  
July 1984 – August 1985  
Law Clerk to the Honorable William J. Brennan, Jr.

U.S. Court of Appeals for the DC Circuit

333 Constitution Avenue N.W.  
Washington, DC 20001  
June 1983 – July 1984  
Law Clerk to the Honorable J. Skelly Wright

Cravath, Swaine & Moore  
825 Eighth Avenue  
New York, NY 10016  
May – June 1983  
Summer Associate

Wilmer, Cutler & Pickering (now WilmerHale)  
1675 Pennsylvania Avenue N.W.  
Washington, DC 20006  
May – July 1982  
Summer Associate

Burns & Fox  
360 Lexington Avenue  
New York, NY 10017  
September 1981 – May 1982  
Law clerk (part-time)

Cadwalader, Wickersham & Taft  
One World Financial Center  
New York, NY 10281  
May – August 1981 (summer associate)  
September 1979 – August 1980 (paralegal)

7. **Military Service and Draft Status:** Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

I have not served in the military, and I did not register for the selective service, because that registration was suspended during the time I would have otherwise been eligible.

8. **Honors and Awards:** List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

Frederick Douglass Human Rights Award, Southern Center for Human Rights, 2006

Arthur Von Briesen Award, National Legal Aid and Defenders Association, 2004

James Kent Scholar, Columbia Law School, 1983

Editor-in-Chief, Columbia Law Review, 1982-1983

I received an award from the Federal Bar Association in 1994 for pro bono amicus assistance provided in support of two Assistant United States Attorneys who were challenging judicially-imposed sanctions on the ground that they were unjustified. *Means v. Chilcutt*, No. 93-1663 (S. Ct. 1994).

9. **Bar Associations:** List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

American Bar Association. I have held no offices.  
 Federal Communications Bar Association. I have held no offices.  
 District of Columbia Bar Association. I have held no offices.  
 New York State Bar Association. I have held no offices.

10. **Bar and Court Admission:**

- a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

July 27, 1987 – New York, no lapses  
 October 2, 1989 – District of Columbia, no lapses

- b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

Supreme Court of the United States, October 1, 1990  
 United States Court of Appeals for the First Circuit, September 12, 1989  
 United States Court of Appeals for the Second Circuit, August 24, 1994  
 United States Court of Appeals for the Third Circuit, August 29, 2003  
 United States Court of Appeals for the Fourth Circuit, June 3, 1988  
 United States Court of Appeals for the Fifth Circuit, March 3, 1997  
 United States Court of Appeals for the Sixth Circuit, July 7, 1989  
 United States Court of Appeals for the Seventh Circuit, May 9, 2005  
 United States Court of Appeals for the Eighth Circuit, October 21, 1996  
 United States Court of Appeals for the Ninth Circuit, October 28, 1998  
 United States Court of Appeals for the Tenth Circuit, March 9, 1999  
 United States Court of Appeals for the Eleventh Circuit, September 20, 1991  
 United States Court of Appeals for the District of Columbia Circuit, January 3, 1994  
 United States Court of Appeals for the Federal Circuit, December 14, 2001  
 United States District Court for the District of Columbia, March 5, 1990  
 United States District Court for the District of Maryland, November 16, 1990  
 United States District Court for the Southern District of New York, July 11, 2006  
 United States District Court for the Eastern District of New York, September 28, 2006  
 United States District Court for the Western District of Michigan, April 10, 2003  
 United States Court of Federal Claims, May 29, 2007

No lapses in membership for any of the above memberships.

11. **Memberships:**

- a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Edward Coke Appellate Inn of Court, 2006 – present. I have held no offices.

Human Rights First (formerly Lawyers Committee for Human Rights), member Washington, DC Advisory Council. I served on the council for a number of years during the 1990s and possibly the early 2000s. I do not recollect and do not have records reflecting the exact period of service, and would note that I am erroneously listed as a member on the organization's website and in the 2007 annual report.

American Constitution Society for Law and Policy. I do not know whether I am formally a member of this body but I have made contributions to the organization. I have held no offices.

Holy Trinity Roman Catholic Church, Washington, DC, 1994 – present. I am a member of the congregation. I have held no offices.

Columbia Law School Board of Visitors, New York, NY, 2005 – present. I have held no offices.

Supreme Court Historical Society (since approximately 2000). I have held no offices.

I have made financial contributions to charitable organizations over the years. I have not included in the list above any organizations to which I gave funds and did not otherwise participate in programmatic activities.

- b. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

Not to my knowledge.

12. **Published Writings and Public Statements:**

- a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

The list below consists of materials I have identified from my recollection, from my files, and from search of Internet databases. A copy is supplied for each item. Despite my searches, there may be other items I have been unable to identify, find, or remember.

*Courtside Column*, with Paul Smith, Julie Carpenter, Katherine Fallow, Matthew Hellman, and Joshua Block, 24 COMM. LAW. 27 (Winter 2007).

*Courtside Column*, with Paul Smith, Julie Carpenter, Katherine Fallow, Matthew Hellman, and Michelle Groman, 24 COMM. LAW. 23 (Fall 2006).

*Courtside Column*, with Paul Smith, Julie Carpenter, and Katherine Fallow, 24 COMM. LAW. 38 (Spring 2006).

*Courtside Column*, with Paul Smith, Julie Carpenter, and Katherine Fallow, 23 COMM. LAW. 34 (Winter 2006).

*Courtside Column*, with Paul Smith, Julie Carpenter, Daniel Mach, and Katherine Fallow, 22 COMM. LAW. 29 (Winter 2005).

Analysis of *Smith v. City of Jackson, Mississippi*, Jenner & Block Website (Sept. 30, 2004).

Analysis of *Dura Pharmaceuticals v. Broudo*, Jenner & Block Website (Sept. 30, 2004).

*Courtside Column*, with Paul Smith, Julie Carpenter, and Katherine Fallow, 22 COMM. LAW. 25 (Summer 2004).

*Financial, Securities, & Telecom: Key Cases Before the Supreme Court*, WASHINGTON LEGAL FOUNDATION, Vol. 18 No. 52 (Dec. 5, 2003).

*Environment and Employment Law: Key Cases Before the Supreme Court*, WASHINGTON LEGAL FOUNDATION, Vol. 18 No. 50 (Nov. 14, 2003).

*Courtside Column*, with Paul Smith, Julie Carpenter, and Deanne Maynard, 21 COMM. LAW. 26 (Summer 2003).

*Courtside Column*, with Paul Smith, Julie Carpenter, and Deanne Maynard, 21 COMM. LAW. 29 (Spring 2003).

*Courtside Column*, with Paul Smith, Jodie Kelley, Julie Carpenter, and Deanne Maynard, 20 COMM. LAW. 24 (Fall 2002).

*Courtside Column*, with Paul Smith, Jodie Kelley, and Julie Carpenter, 20 COMM. LAW. 36 (Summer 2002).

*Courtside Column*, with Paul Smith, Jodie Kelley, and Julie Carpenter, 20 COMM. LAW. 30 (Spring 2002).

*Courtside Column*, with Paul Smith, Jodie Kelley, and Julie Carpenter, 19 COMM. LAW. 38 (Winter 2002).

*Courtside Column*, with Paul Smith and Nory Miller, 19 COMM. LAW. 43 (Spring 2001).

*Courtside Column*, with Paul Smith and Nory Miller, 18 COMM. LAW. 39 (Winter 2001).

*Playboy* and *City of Erie*: Shift Toward Balancing?, with Deanne Maynard, 18 COMM. LAW. 12 (Fall 2000).

*Courtside Column*, with Bruce Ennis and Paul Smith, 17 COMM. LAW. 23 (Winter 2000).

*The Realists' Guide to Redistricting: Avoiding the Legal Pitfalls*, with J. Gerald Hebert, Paul Smith, and Sam Hirsch, Monograph published by American Bar Association Section on Administrative Law (2000).

*Courtside Column*, with Paul Smith and Bruce Ennis, 17 COMM. LAW. 26 (Summer 1999).

*Courtside Column*, with Bruce Ennis and Paul Smith, 17 COMM. LAW. 20 (Spring 1999).

*Turner Broadcasting* and the First Amendment, with Michelle Goodman, 15 COMM. LAW. 7 (July 1997).

*The Realists' Guide to Redistricting: Avoiding the Legal Pitfalls*, with J. Gerald Hebert, Paul M. Smith, Sam Hirsch, and Heather Gerken (1997).

*Note: Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328 (1982).

From 1982 to 1983, I served as editor-in-chief of the Columbia Law Review.

- b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

None.

- c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

The list below consists of materials I have identified from my recollection, from

my files, and from search of Internet databases. Despite my searches, there may be other items I have been unable to identify, find, or remember.

On April 8, 2008, I testified before the United States Senate Committee on the Judiciary, Subcommittee on the Constitution on the Adequacy of Representation in Capital Cases. A transcript of my testimony is provided.

May 13, 2002, Letter to U.S. Senate Judiciary Chairman Patrick Leahy opposing legislation proposed in response to the Supreme Court decision *Ashcroft v. The Free Speech Coalition*. A copy is provided.

On December 6, 2001, I testified before the United State House of Representatives, Subcommittee on Commercial and Administrative Law and the Subcommittee on Courts, the Internet, and Intellectual Property of the Committee on the Judiciary on the proposed settlement of NextWave's licenses with the Federal Communications Commission. A transcript of my testimony is provided.

On February 3, 1989, I testified before the Judicial Proceedings Committee of the Maryland State Senate in support of Senate Bill 75, a bill that would preclude imposition of the death penalty on the mentally retarded. A transcript of my testimony is provided.

- d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

The list below consists of speeches or talks I have identified from my recollection, from my files, and from search of Internet databases. Despite my searches, there may be other speeches or talks I have been unable to identify, find, or remember.

Nov. 18, 2009. Panelist, "The State of the State Secrets Privilege: Obama Administration Policy and Practice," American University Washington College of Law. Audio of the discussion is available at [http://www.wcl.american.edu/podcast/podcast.cfm?uri=http://www.wcl.american.edu/podcast/audio/20091130\\_WCL\\_SSSP-2.mp3&email](http://www.wcl.american.edu/podcast/podcast.cfm?uri=http://www.wcl.american.edu/podcast/audio/20091130_WCL_SSSP-2.mp3&email).

Nov. 21, 2008. Panelist, "The Attacks Upon Statutory Damages and the 'Making Available' Right: The Possible Aftereffects on Big and Small Business Litigation Strategies," Fordham Intellectual Property, Media & Entertainment Law Journal Conference. A transcript is provided.

Oct. 7, 2008. Panelist, 2008-2009 Supreme Court Preview, Colorado Lawyers Chapter, American Constitution Society. The organization's address is: 1333 H Street NW, 11th Floor, Washington, DC 20005. I have no notes, transcript or

recording. I served on a panel discussing significant cases on the Supreme Court's docket for the October 2008 term. A summary of the remarks is provided.

Aug. 14, 2008. Panelist, "*Viacom v. Google: Implications for User Generated Content*," West Legalworks Webcast. A copy of the presentation is provided.

June 13, 2008. Panelist, "(In)effective Assistance of Counsel for Criminal Defendants: Constitutional Standards and Practical Solutions," American Constitution Society Annual Convention. Video of the panel is available at <http://www.acslaw.org/node/6784>.

May 20, 2008. Panelist, "Supreme Court Update," *InsideCounsel's* SuperConference. *InsideCounsel's* address is: 222 South Riverside Plaza, Suite 620, Chicago, IL 60606. I have no notes, transcript, or recording. I served as a panelist commenting on the most significant decisions, released and pending, of the Supreme Court's term.

Apr. 28, 2008. Panelist, "Don Verilli [sic] on Lethal Injection," American Constitution Society, University of Chicago Law School chapter. The organization's address is: 1111 East 60th Street, Chicago, IL 60637. I spoke to the student chapter of the American Constitution Society on the *Baze v. Rees* case. I have no notes, transcript or recording.

Mar. 28, 2008. Panelist on intellectual property issues involving user-generated content, Fordham University Intellectual Property Law and Policy Conference. A transcript of the event is provided.

Mar. 19, 2008. Opening Address, Women's Bar Association of the District of Columbia, event on Women of Color in law firms. The organization's address is: 2020 Pennsylvania Avenue NW, Suite 446, Washington, DC 20006. I have no notes, transcript, or recording. I gave brief opening remarks at the outset of the conference. A quotation from my remarks is provided.

Mar. 13, 2008. Second Annual Fordham Law and Information Society Lecture, Intellectual Property and the Internet. Lecture notes are provided.

Mar. 12, 2008. Guest lecturer at an intellectual property law class taught by Professor Scott Hemphill at Columbia Law School. The organization's address is: Columbia Law School, 435 West 116th Street, New York, NY 10027. I have no notes, transcript or recording. I spoke about the copyright liability and Digital Millennium Copyright Act issues raised in *Viacom v. YouTube*.

Jan. 15, 2008. Moderator, "Book discussion On Free Speech With Anthony Lewis," American Constitution Society. The organization's address is: 1333 H Street NW, 11th Floor, Washington, DC 20005. I interviewed Anthony Lewis about his book, *Freedom For The Thought That We Hate*. I have no notes, transcript or recording. We discussed the First Amendment issues raised in his book.

Nov. 21, 2007 (approximately). I spoke to an intellectual property law class at the University of North Carolina Law School. The organization's address is: University of North Carolina Law School, Van Hecke-Wettach Hall, 160 Ridge Road, CB #3380, Chapel Hill, NC 27599-3380. I have no notes, transcript or recording. I gave a presentation and took questions on the copyright liability and Digital Millennium Copyright Act issues raised by the *Viacom v. Google* case.

Nov. 14, 2007. Speaker, Intellectual Property Workshop, University of Michigan Law School (hosted by Professor Jessica Litman). The organization's address is: The University of Michigan Law School, 625 South State Street, Ann Arbor, MI 48109-1215. I have no notes, transcript or recording. I gave a presentation and took questions on the copyright liability and Digital Millennium Copyright Act issues raised by the *Viacom v. Google* case.

Nov. 7, 2007. Panelist, "*Strickland v. Washington*: How Effective is the Right to Effective Assistance of Counsel?" Library of Congress Law Library and Constitution Project. A webcast is available at: [www.loc.gov/today/cyberlc/feature\\_wdesc.php?rec=4233](http://www.loc.gov/today/cyberlc/feature_wdesc.php?rec=4233).

Sept. 18, 2007. Speaker, "Copyright and Fair Use / Fair Dealing in the Digital Age," Media Law Resource Center, London Conference. The organization's address is: Media Law Resource Center, 520 Eighth Avenue, North Tower, 20th Floor, New York, NY 10018. I have no notes, transcript, or recording. I gave a presentation on the copyright liability and Digital Millennium Copyright Act issues raised by the *Viacom v. Google* case. An agenda for the event is provided although I am not listed on the agenda.

Sept. 14, 2007. Moot Court Judge, "Guantanamo Detainees and the Military Commissions Act," William & Mary School of Law. Video available at: <http://www.c-spanvideo.org/program/GuantanamoDet>.

June 7, 2007. Speaker, Jenner & Block reception for judicial interns. The firm's address is: 1099 New York Avenue NW, Washington, DC 20001. I have no notes, transcript or recording. I have no recollection of the topic on which I spoke.

June 2007. Panelist on IP Law, Columbia Law School Reunion. The organization's address is: Columbia Law School, 435 West 116th Street, New York, NY 10027. I have no notes, transcript, or recording. I served on a panel and discussed the copyright liability and Digital Millennium Copyright Act issues raised by the *Viacom v. Google* case.

Apr. 12-13, 2007. Panelist on intellectual property issues involving user-generated content, Fordham University Intellectual Property Law and Policy Conference. Transcript provided for Part A and B of panel entitled "Unauthorized Use of Works on the Web: What Can Be Done? What Should Be Done?"

Mar. 16, 2007. Panelist, "What Goes Up Must Come Down: Copyright and Process in the Age of User-Posted Content." The Progress & Freedom

Foundation. Audio of the discussion is available at:  
<http://www.pff.org/events/pastevents/031607usercontentsites.asp>.

Feb. 15, 2007. Panel on the topic of appellate advocacy and appellate practice, "How To Be An Effective Appellate Advocate" at Columbia Law School. The organization's address is: Columbia Law School, 435 West 116th Street, New York, NY 10027. Judge Sutton of the U.S. Court of Appeals for the Sixth Circuit and Andrew Levander were also on the panel. I have no notes, transcript or recording.

Nov. 2006. Speaker, Southern Center for Human Rights annual dinner. The organization's address is: Southern Center for Human Rights, 83 Poplar Street NW, Atlanta, GA 30303. I have no notes, transcript or recording. I gave brief remarks expressing thanks for receiving the organization's Frederick Douglass Award.

Oct. 4, 2006. Welcome address at Vault Legal Diversity Job Fair hosted at Jenner & Block's Chicago office. The organization's address is: Vault Inc., 75 Varick Street, 8th Floor, New York, NY 10013. I have no notes, transcript, or recording, but select quotes from my remarks are provided.

Aug. 2006. Speaker, "Jenner & Block Fifth Annual Diversity Dinner." The firm's address is: 1099 New York Avenue NW, Washington, DC 20001. I have no notes, transcript or recording.

Apr. 21, 2006. Introduction of keynote speaker, Michelle Coleman Mayes, at Vault and the Minority Corporate Counsel Association Legal Diversity Job Fair in New York City. The organization's addresses are: Vault Inc., 75 Varick Street, 8th Floor, New York, NY 10013; and Minority Corporate Counsel Association, 1111 Pennsylvania Avenue NW, Washington, DC 20004. I have no notes, transcript, or recording. I gave a brief introduction of Ms. Mayes at the start of the job fair.

Apr. 19, 2006. Panelist, *Inside Counsel's* SuperConference. The organization's address is: Inside Counsel, 222 South Riverside Plaza, Suite 620, Chicago, IL 60606. I have no notes, transcript or recording. I served as a panelist commenting on the most significant decisions, released and pending, of the Supreme Court's term.

Mar. 19-23, 2006. Panelist, "Lessons from the Past: How Can the Telecom Rewrite be Crafted to Avoid Potential Delays Cause by All Those Hungry Lawyers?" TelecomNEXT Conference, Las Vegas, Nevada. The organization's address is: TelecomNEXT 607 14th Street NW, Suite 400, Washington, DC 20005-2164. I have no notes, transcript or recording. I served on a panel discussing possible legislative changes to the 1996 Telecommunications Act.

Jan. 13, 2006. Web Seminar, "*Merrill Lynch v. Dabit and Beyond: The Supreme Court Looks at Securities Fraud*," The Washington Legal Foundation. A webcast of the seminar is available at:  
[http://208.112.47.239/communicating/webseminar\\_detail.asp?id=103](http://208.112.47.239/communicating/webseminar_detail.asp?id=103)

Nov. 10, 2005. Panelist, "Practical Tips for Appellate Litigation and FCC Advocacy, Federal Communications Bar Association. The Federal Communications Bar Association's address is: 1020 19th Street NW, Suite 325, Washington, DC, 20036-6101. I have no notes, transcript or recording. I served on a panel discussing appellate advocacy. A program of the seminar is provided.

Oct. 5, 2005. Webcast, "*MGM v. Grokster*," Association of Corporate Counsel's Information Technology Law and eCommerce Committee, located at <http://phx.corporate-ir.net/phoenix.zhtml?c=129735&p=irol-EventDetails&EventId=1121951>. A transcript is also provided.

Sept. 13, 2005. Panelist, "IP in a post-*Grokster* World, Future of Music Coalition," Future of Music Summit, Washington, DC. Video of this discussion is available at: <http://www.tvworldwide.com/showclip.cfm?ID=6134&clip=2>.

July 20, 2005. CLE Program, "The *Grokster* Decision: Is This When the Music Stops?" Practising Law Institute. Practising Law Institute's address is: 810 Seventh Avenue, 21st Floor, New York, NY 10019. I have no notes, transcript or recording. I discussed the Supreme Court's June 2005 decision in *MGM Studios, Inc. v. Grokster*.

July 19, 2005. Panelist, "What Does the Grokster Decision Mean for Congress, the Courts and the Marketplace?" Advisory Committee to the Congressional Internet Caucus. Video of the discussion is available at <http://www.netcaucus.org/events/2005/grokster/video.shtml>.

June 24, 2005. Panelist, "MGM Studios v. Grokster." Pepperdine University School of Law, Sixth Annual Technology Law Conference. Pepperdine University School of Law's address is: 24255 Pacific Coast Highway, Malibu, CA 90263. I have no notes, transcript, or recording. I discussed the issues raised by *MGM Studios, Inc. v. Grokster*.

June 22, 2005. Speaker, "Supreme Court Update: Analysis and Predictions." SuperConference 2005. Corporate Legal Times. Corporate Legal Times is now named "Inside Counsel" and located at 222 South Riverside Plaza, Ste 620, Chicago, IL 60606. I have no notes, transcript, or recording. I served as a panelist commenting on the most significant decisions, released and pending, of the Supreme Court's term.

May 2, 2005. Panelist, "P2P Technology and the Law," Association of the Bar of the City of New York, Committee on Information Technology Law. The organization's address is: Association of the Bar of the City of New York, Committee on Information Technology Law, 42 West 44th Street New York, NY, 10036. I have no notes, transcript, or recording. I served on a panel and discussed the issues raised by *MGM Studios, Inc. v. Grokster*.

Apr. 27, 2005. Panelist, "Copyright in Cyberspace," the Media Institute Communications Forum. The organization's address is: Media Institute, 2300 Clarendon Boulevard, Suite 602, Arlington, VA 22201. I have no notes, transcript or recording. I served on a panel and discussed the issues raised by *MGM Studios v. Grokster*.

Dec. 2004. Acceptance speech following receipt of Arthur von Briesen Award, National Legal Aid & Defender Association. The organization's address is: National Legal Aid & Defender Association, 1140 Connecticut Avenue NW, Suite 900, Washington, DC 20036. I have no notes, transcript, or recording. I gave brief remarks giving thanks for being chosen as the recipient of the award.

Sept. 15, 2004. Panelist, Supreme Court Preview, Washington Legal Foundation. I served on a panel discussing the significant cases on the Supreme Court's docket for the October 2004 term. A webcast of the panel is available at: <http://iiscast.wlf.org/vod/12004supremecourtpre000/archiveA.html>.

Apr. 20, 2004. Panelist on media ownership issues, National Association of Broadcasters Convention. The organization's address is: National Association of Broadcasters, 1771 N Street NW, Washington, DC 20036. I have no notes, transcript, or recording. A description of the panel is provided, and is available at: "Powell Supports Ferree's DTV Idea, Warns Against Alternatives," COMMUNICATIONS DAILY, Jan. 26, 2005.

Apr. 1, 2004. Panelist, "Section 2 and Refusals to Deal After *Trinko*," American Bar Association, Section of Antitrust Law, Spring Meeting. The organization's address is: American Bar Association, 321 N. Clark St., Chicago, IL 60654-7598. I have no notes, transcript, or recording. I served on a panel and discussed the antitrust implications of the Supreme Court's decision in *Verizon Communications v. Trinko*.

Oct. 24, 2003. Keynote address, ABA Death Penalty Project's "Strengthening the Guiding Hand of Counsel: Reforming Capital Defense Systems" symposium, Hofstra University School of Law. The organization's address is: American Bar Association, 740 15th Street NW, Washington, DC 20005-1019. I have no notes, transcript or recording. I spoke about my experience litigating *Wiggins v. Smith*.

Oct. 21, 2003. Speaker, Chicago Inn of Court, "Supreme Court Practice – Preview of this Term's Key Cases. The organization's address is: Chicago-American Inn of Court, 10 South LaSalle, Suite 3600, Chicago, IL, 60603. I have no notes, transcript or recording. I spoke at the Inn of Court meeting on the significant cases on the Supreme Court's docket for the October 2003 term.

Oct. 16-17, 2003. Speaker, "Minimizing Liability," Lawyers for Libraries Conference of the American Library Association, San Francisco, CA. The organization's address is: American Library Association, 50 E. Huron, Chicago IL 60611. I have no notes, transcript or recording. I spoke on liability issues facing libraries.

Sept. 23, 2003. Panelist, Supreme Court Preview, Washington Legal Foundation. The organization's address is: Washington Legal Foundation, 2009 Massachusetts Avenue NW, Washington, DC 20036. I have no notes, transcript, or recording. I served on a panel discussing the significant cases on the Supreme Court's docket for the October 2003 term. An article describing this event is provided, and is located at: "New U.S. Docket Holds Little for Risk Managers," Business Insurance, Oct. 13, 2003.

May 13, 2003. Speaker, "Minimizing Liability," Lawyers for Libraries Conference of the American Library Association, Chicago, Illinois. The organization's address is: American Library Association, 50 East Huron, Chicago IL 60611. I have no notes, transcript or recording. I spoke on liability issues facing libraries.

Apr. 3, 2003. Panelist, "The Intersection of Bankruptcy and Regulation: Implications of NextWave," American Bar Association, Section of Business Law Spring Meeting. The organization's address is: American Bar Association, Section of Business Law, 321 North Clark Street, Chicago, IL 60654-7598. I have no notes, transcript, or recording. I served on a panel and discussed the implications of the Supreme Court's decision in *Federal Communications Commission v. NextWave*.

Feb. 27, 2003. Speaker, "Minimizing Liability," Lawyers for Libraries Conference of the American Library Association, Washington, DC. The organization's address is: American Library Association, 50 East Huron, Chicago IL 60611. I have no notes, transcript or recording. I spoke on liability issues facing libraries.

Sept. 17, 2002. Panelist, Supreme Court Preview, Washington Legal Foundation. The organization's address is: Washington Legal Foundation, 2009 Massachusetts Ave., NW, Washington, DC 20036. I have no notes, transcript, or recording. I served on a panel discussing the significant cases on the Supreme Court's docket for the October 2002 term. An article describing this event is provided, and is located at: "NextWave Counsel Calls Litigation Settlement 'Exceedingly Unlikely,'" GlobalWireless.com, Sept. 20, 2002.

July 12, 2002. Speaker, "Supreme Court and Local Competition" seminar. The organization's address is: Federal Communications Bar Association, 1020 19th Street NW, Suite 325, Washington, DC, 20036-6101. I have no notes, transcript, or recording. Chicago Chapter of the Federal Communications Bar Association.

June 11, 2002. Panelist, "The Future of Telecommunications Regulation Conference," The American Enterprise Institute. The organization's address is: American Enterprise Institute for Public Policy Research, 1150 Seventeenth Street NW, Washington, DC 20036. I have no notes, transcript, or recording. I do not specifically recall the subject of my panel presentation but I believe it involved a discussion of how competition in the telecommunications market would evolve in light of legal changes.

Apr. 7-11, 2002. Panelist, "First Amendment Issues," National Association of Broadcasters Annual Convention, Las Vegas, Nevada. The organization's address is: 1771 N Street NW, Washington, DC 20036. I have no notes, transcript or recording. I served on a panel discussing broadcast media First Amendment issues.

Mar. 14, 2002. After-dinner speech at the Columbia Law Review annual banquet. The organization's address is: Columbia Law School, 435 West 116th Street, New York, NY 10027 I have no notes, transcript or recording. The general theme

of the talk was the importance of commitment to the values of the legal profession and the importance of avoiding cynicism.

Sept. 30, 2001. Panelist, Telecommunications Panel, ABA Section of Administrative Law and Regulatory Practice Conference. I have no notes, transcript, or recording.

Aug. 7, 2001. Panelist, "The Anti-Violence Agenda," AEJMC annual convention. The organization's address is: 234 Outlet Pointe Boulevard, Suite A, Columbia, SC 29210. I have no notes, transcript, or recording. I do not recall the specific subject of the panel.

Apr. 24, 2001. Panelist, National Association of Broadcasters Convention. The organization's address is: 1771 N Street NW, Washington, DC 20036. An article indicates that this panel discussed regulation. I have no notes, transcript, or recording. An article describing this event is provided, and is located at: "NAB Notebook," COMMUNICATIONS DAILY, Apr. 26, 2001.

Oct. 24, 2000. Panelist, Panel on "Competition, Convergence and the Constitution: Will Marketplace Changes Affect First Amendment Standards for the Electronic Media?" at Freedom Forum, National Association of Broadcasters Education Foundation conference entitled The Electronic Media and the First Amendment in the 21<sup>st</sup> Century. The organization's address is: 1771 N. St. NW, Washington, DC 20036. I have no notes, transcript, or recording. I served on a panel discussing changes in First Amendment law in response to changes in the media marketplace.

Sept. 27, 2000. Panelist, "Telecommunications, Four More Years?" The 2000 Election and the FCC, Federalist Society Telecommunications & Electronic Media Practice Group, Washington, DC. The organization's address is: 1015 18th Street NW, Suite 425, Washington, DC 20036. A transcript is provided.

Apr. 2000. Panelist, National Association of Broadcasters Convention. The organization's address is: 1771 N Street NW, Washington, DC 20036. An article indicates that I spoke at this convention. I have no notes, transcript, or recording. An article describing this event is located at: "Yahoo's Yang Warns NAB Not to Slow Convergence in Washington," COMMUNICATIONS DAILY, Apr. 13, 2000.

Sept. 15, 1998. Panelist, Supreme Court Preview, The Washington Legal Foundation. The organization's address is: Washington Legal Foundation, 2009 Massachusetts Avenue NW, Washington, DC 20036. I have no notes, transcript, or recording. I served on a panel discussing the significant cases on the Supreme Court's docket for the October 1998 term.

Aug. 7, 1997. Panelist on State Legislative Redistricting Issues, The National Conference of State Legislatures. Video is available at: <http://www.c-spanvideo.org/program/StateLegis>.

Sept. 9, 1994. Panelist, "The Supreme Court, Racial Politics and the Right to Vote: *Shaw v. Reno* and the Future of the Voting Rights Act," American

University Conference, panel entitled “Rehnquist Court and Voting Rights.”  
Video is available at: <http://www.c-spanvideo.org/program/Rehnqu>.

Aug. 13, 1991. Panelist on Term Limits, National Conference of State Legislatures, 1991 Annual Convention – Term Limits. The organization’s address is: National Conference of State Legislatures, 444 North Capitol Street NW, Suite 515, Washington, DC 20001. I have no notes, transcript, or recording. I served on a panel and discussed constitutional issues raised by legislative imposition of term limits.

Panelist, Progressive Career Panel, American Constitution Society, DC Lawyers Chapter. The organization’s address is: American Constitution Society, 1333 H Street NW, 11th Floor, Washington, DC 20005. I have no notes, transcript or recording. I am not certain of the date but I believe the panel took place in the fall of 2004 or 2005.

I spoke on a panel at the National Association of Criminal Defense Lawyers or the National Legal Aid & Defender Association on the *Wiggins v. Smith* case. I have no notes, transcript or recording. I do not recall the date of the presentation but it may have been in 2004 or 2005. The addresses of these organizations are: National Association of Criminal Defense Lawyers, 1660 L Street NW, 12<sup>th</sup> Floor, Washington, DC 20036; National Legal Aid & Defender Association, 1140 Connecticut Avenue NW, Suite 900, Washington, DC 20036.

I spoke on a panel at the DC Criminal Practice Institute, on the *Wiggins v. Smith* case and the Sixth Amendment right to effective assistance of counsel. I have no notes, transcript or recording. I do not recall the date of the presentation but it may have been November 2003. The organization’s address is: The Public Defender Service for DC, 633 Indiana Avenue NW, Washington, DC 20004.

- e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

The list below consists of interviews I have identified from my recollection, from my files, and from search of Internet databases. A copy is supplied for each interview. Despite my searches, there may be other interviews I have been unable to identify, find, or remember.

SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION, pp. 500, 506 and accompanying endnotes at pp. 641, 642 (2010).

“The Anointed,” POLITICO.COM, July 23, 2010.

“White House Lawyer to Teach at Harvard Law,” THE BOSTON GLOBE, May 8, 2010.

“A Rookie Sets a Precedent and Maybe Saves a Life,” THE NATIONAL LAW JOURNAL, Jan. 4, 2010.

“Jenner’s Justice,” THE NATIONAL LAW JOURNAL, February 9, 2009.

“Secretary Clinton’s Far East,” THE WASHINGTON POST, Feb. 9, 2009.

“Supreme Court Veteran and Renowned Litigator Donald Verrilli to Join DOJ as Associate Deputy Attorney General,” JENNER & BLOCK PRESS RELEASE VIA PR NEWswire, Feb. 4, 2009.

“Death Row Appeal Involves Right to Lawyer,” USA TODAY, Jan. 14, 2009.

“HRC Honors Jenner & Block for Long-standing Commitment to LGBT Civil Rights,” JENNER & BLOCK, EQUAL TIMES, Fall 2008.

“Power Lawyers: The 100 Most Influential Attorneys in Entertainment,” HOLLYWOOD REPORTER, July 25, 2008.

“Court Braces for Death Appeals,” LEGAL TIMES, Apr. 21, 2008.

“Splintered Court OKs Death Protocol,” THE NATIONAL LAW JOURNAL, Apr. 21, 2008.

“High Court Deems Lethal Injections Constitutional,” CONNECTICUT LAW TRIBUNE, Apr. 21, 2008.

“Justices Uphold Lethal Injection in Kentucky Case,” THE NEW YORK TIMES, Apr. 17, 2008.

“Supreme Court Upholds Kentucky’s Lethal Injections,” THE NATIONAL LAW JOURNAL, Apr. 16, 2008.

Interview on All Things Considered, “Justices Rule Lethal Injection is Constitutional,” NATIONAL PUBLIC RADIO, Apr. 16, 2008.

Religion and Ethics NewsWeekly, “COVER: Lethal Injection,” PUBLIC BROADCASTING SERVICE, Mar. 28, 2008.

“For Two Veteran Advocates, A Tough Week at the Supreme Court,” LEGAL TIMES, Jan. 14, 2008.

Press Conference following arguments in *Baze v. Rees*, CSPAN, Jan. 7, 2008, video available at: <http://www.c-spanvideo.org/videoLibrary/search-results.php?key%5B%5D=verrilli>.

“Justices Weigh Lethal Injection,” STATELINE, Jan. 7, 2008.

“Kentucky Case Puts Lethal Injection to Test,” THE TIMES UNION (ALBANY, NY), Jan. 6, 2008.

“Supreme Court to Hear Death Penalty Case,” UPI, Jan. 6, 2008.

“Supreme Court May Shift in Cases Over Bad Lawyering,” LEGAL TIMES, Nov. 13, 2007.

“Viacom: Copyright Detection or Not, Lawsuit Still On!,” MARKETING PILGRIM, Oct. 17, 2007.

“September Target Date to Block Copyrighted Videos,” ASSOCIATED PRESS FINANCIAL WIRE, July 28, 2007.

“Youtube Says September is Target Time to Block Copyrighted Videos,” ASSOCIATED PRESS, July 27, 2007.

“At the High Court, Sometimes It’s Personal,” LEGAL TIMES, July 9, 2007.

“Supreme Effort,” THE AMERICAN LAWYER, July 2007.

“YouTube and its Dis-Contents,” CORPORATE COUNSEL, May 1, 2007.

Renee Montagne, “Viacom, Google Tussle Over YouTube Content,” NATIONAL PUBLIC RADIO, Mar. 23, 2007.

“Intellectual Property: The Quest to Redefine Copyright Fairness,” NATIONAL JOURNAL’S TECHNOLOGY DAILY, Mar. 16, 2007.

“Program Owners Trying to Push Rights Enforcement onto Websites,” TELEVISION A.M., Mar. 9, 2007.

“Broadening Diversity Scholarships’ Reach Helps Students and the Firm,” EQUAL TIME BY JENNER & BLOCK, Spring 2007.

“Death Penalty Disquiet Echoes Earlier Time,” LEGAL TIMES, July 10, 2006.

Interview by Nina Totenberg, “Justices Open Door for Death Row Challenges,” NATIONAL PUBLIC RADIO, June 13, 2006.

“Missouri Inmates Have Stake in Case,” THE KANSAS CITY STAR, Apr. 27, 2006.

“Lawyers See Litigation as Inevitable in Wake of New Act,” TR DAILY, Mar. 24, 2006.

“Public Minded,” THE AMERICAN LAWYER, Jan. 2006.

“People & Stories of 2005,” CORPORATE LEGAL TIMES, Dec. 2005.

“Family Lawyers are Suing Judges Over Casework,” THE NATIONAL LAW JOURNAL, Oct. 31, 2005.

“Family Feud Erupts Over Court Picks,” LEGAL TIMES, Oct. 24, 2005.

"Experts Expound on High Court's Future," CORPORATE LEGAL TIMES, Sept. 2005.

"Legal Matters: Supreme Team," BILLBOARD.COM, July 9, 2005.

"Supreme Court hands Hollywood Huge Win; In Ruling Against Grokster, Streamcast," VIDEO BUSINESS, July 4, 2005.

"High Court: P2P Services May be Sued for Infringement," BACK STAGE, June 30, 2005.

"Studios Win Right to Sue File Sharers," RECORDER, June 28, 2005.

"Hollywood Wins Internet Piracy Battle," CNNMONEY.COM, June 27, 2005.

"Supreme Court Ruling," VOICE OF AMERICA NEWS, June 27, 2005.

"Today's U.S. Supreme Court Ruling on File-Sharing Software," NATIONAL PUBLIC RADIO, June 27, 2005.

NewsHour with Jim Lehrer: "Day of Decisions," PUBLIC BROADCASTING SERVICE, June 27, 2005.

"Whose rights were trampled?," SUPERVISION, June 1, 2005.

"Intellectual Property: Friends, Foes of Grokster Assess Supreme; Court Hearing," NATIONAL JOURNAL'S TECHNOLOGY DAILY, Mar. 29, 2005.

"Court Surfs File-Sharing, Cable Cases," THE NATIONAL LAW JOURNAL, Mar. 28, 2005.

"Entertainment Industry Blasts Grokster," COMMUNICATIONS DAILY, Jan. 26, 2005.

"Disparate Cast Lobbies Court To Restrict File Sharing," THE WASHINGTON POST, Jan. 26, 2005.

"Peer Support Groups: MPAA, RIAA Field Army For P2P Court Battle," DAILY VARIETY, Jan. 26, 2005.

"Intellectual Property: Entertainment Industry Highlights Support in Grokster Case," NATIONAL JOURNAL'S TECHNOLOGY DAILY, Jan. 25, 2005.

Interview by Regan Morris, LAW-CROSSING.COM (2005).

"Supreme Court Takes On Emerging Issues in Copyright, International Law," THE NATIONAL LAW JOURNAL, Dec. 13, 2004.

"High Court Grants Cert in Copyright, International Law Cases," THE NATIONAL LAW JOURNAL, Dec. 10, 2004.

“Supreme Court Considers Intent in Age-Bias Case,” DULUTH NEWS-TRIBUNE, Nov. 4, 2004.

“12 Year Battle for Kevin Wiggins Comes to an End,” JENNER & BLOCK PRESS RELEASE, Oct. 15, 2004.

“Wiggins Accepts Offer of Life Term,” THE BALTIMORE SUN, Oct. 8, 2004.

“Metro; In Brief,” THE WASHINGTON POST, Oct. 7, 2004.

“Justices Mull RIAA, Verizon Dispute,” THE NATIONAL LAW JOURNAL, Oct. 4, 2004.

“Justices Will Pick Up With ‘Mess’ From Last Term,” THE SEATTLE POST-INTELLIGENCER, Sept. 25, 2004.

“Morris Asks U.S. Supreme Court to Hear PGA Tour Case,” THE ASSOCIATED PRESS STATE & LOCAL WIRE, Aug. 28, 2004.

“News Organization Appeals to Supreme Court for PGA Tour Golf Score Access,” FLORIDA TIMES-UNION, Aug. 27, 2004.

“Confusion Over Telecom Competition,” BILLING WORLD AND OSS TODAY, Apr. 2004.

“Broadband Takes Back Seat to POTS in D.C. Court Appeal,” BROADBAND BUSINESS REPORT, Mar. 9, 2004.

“Competitors Predict Overturn of D.C. Circuit Decision on UNEs,” COMMUNICATIONS DAILY, Mar. 4, 2004.

“Death-Defying Acts,” THE AMERICAN LAWYER, Jan. 2004.

“C-block Bankruptcy Action Spills Into '04,” RCR WIRELESS NEWS, Jan. 12, 2004.

“RIAA Smells Victory; Case Transfer Would Aid Music Industry,” THE SAN FRANCISCO CHRONICLE, Nov. 22, 2003.

“Bias Suit Targets Age Act's Intent; Workers Take Their Complaint That Pension Plan Favors Older Employees to Top Court,” THE TIMES UNION (ALBANY, NY), Nov. 9, 2003.

“Great Expectations,” LOS ANGELES DAILY JOURNAL, Oct. 6, 2003.

“Justices Face Election Season Scrutiny,” CHICAGO TRIBUNE, Oct. 6, 2003.

“He Wants to Ring Verizon's Bell,” LEGAL TIMES, Oct. 6, 2003.

“Verizon, Record Companies Duel Over ‘Net Piracy,’” TECHNEWS.COM, Sept. 16, 2003.

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“Judge Overturns 1989 Conviction, Death Sentence; State Considers an Appeal in Balto. County Drowning,” THE BALTIMORE SUN, Sept. 20, 2001.

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“Gephardt-Clay Redistricting Power Struggle Goes Public,” ST. LOUIS POST-DISPATCH, Apr. 22, 2001.

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“Death-row Organ Donor Hands Court A Puzzle,” THE WASHINGTON TIMES, Dec. 4, 1995.

“The Beginning Of The End Of Affirmative Action,” NEW PITTSBURGH COURIER, Nov. 15, 1995.

“Ad Decision Could Spur a Rollback,” THE NATIONAL LAW JOURNAL, July 3, 1995.

“Big Suits, Pro Bono,” THE AMERICAN LAWYER, Jan./Feb. 1995.

“New Era or Step Backward?,” THE NATIONAL LAW JOURNAL, Jan. 23, 1995.

“Murder Conviction Voided for Misconduct,” FULTON COUNTY DAILY REPORTER, Oct. 26, 1994.

“Voting Rights Act is Limited; Rulings on Districts, 1-Man Body are Setbacks for Minorities,” ST. LOUIS POST-DISPATCH (MISSOURI), July 1, 1994.

“High Court Furthers Lawyer Speech Right,” THE NATIONAL LAW JOURNAL, June 27, 1994.

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“Tax Services Firm Seeks to Strip CPA Cloak,” THE MIAMI HERALD, May 30, 1994.

“Fla. Redistricting Tops Supreme Court Agenda,” PALM BEACH POST, Oct. 4, 1993.

“Ad Limits Get Harder to Enact,” THE NATIONAL LAW JOURNAL, July 26, 1993.

“American Telephone and Telegraph Co. v. MCI Telecommunications Corp.,” LEGAL TIMES, July 19, 1993.

“Victims of War, Hunger: Somalis Trapped in U.S. System,” USA TODAY, Nov. 13, 1992.

“Discrimination is Becoming More Subtle,” THE MIAMI HERALD, July 22, 1992.

“Term Limits Gain Momentum,” CHRISTIAN SCIENCE MONITOR, Oct. 15, 1991.

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“High Court Rejects Patient’s Appeal,” DAILY NEWS, Mar. 26, 1991.

“State Courts Backed on Capital Cases,” CHICAGO TRIBUNE, Mar. 29, 1990.

“Supreme Court Ruling Will Set Letterhead Limits for Ill. Lawyers,” CRAIN’S CHICAGO BUSINESS, Oct. 9, 1989.

“IP Alumni: From Law Partners to Movie Producers,” COLUMBIA LAW SCHOOL, Undated.

**13. Public Office, Political Activities and Affiliations:**

- a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

Appointed by President Barack Obama to be Deputy Counsel to the President (June 2010 – present) and Senior Counsel to the President (February – May 2010)

Appointed by Attorney General Eric Holder to be an Associate Deputy Attorney General (February 2009 – January 2010)

- b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever

held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

Obama For America, volunteer attorney, February 2007 – November 2008

Democratic Congressional Campaign Committee, volunteer attorney, October – November 2006

Kerry presidential campaign, volunteer attorney, August – November 2004

I also served as a volunteer member of transition teams for then-President Elect Clinton in 1992-1993 and then-President Elect Obama in 2008-2009, and I provided volunteer assistance to Senator Joseph Lieberman in preparing for the Vice Presidential debate in 2000.

14. **Legal Career:** Answer each part separately.

a. Describe chronologically your law practice and legal experience after graduation from law school including:

i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

The Honorable William J. Brennan, Jr., Supreme Court of the United States,  
July 1984 – August 1985

The Honorable J. Skelly Wright, U.S. Court of Appeals for the DC Circuit,  
June 1983 – July 1984

ii. whether you practiced alone, and if so, the addresses and dates;

I have not been a sole practitioner.

iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

Office of the White House Counsel  
The White House  
Washington, DC 20500  
February 2010 – present  
Deputy Counsel to the President (June 2010 – present)  
Senior Counsel to the President (February – May 2010)

United States Department of Justice  
950 Pennsylvania Avenue N.W.  
Washington, DC 20530  
February 2009 – January 2010

Associate Deputy Attorney General

Jenner & Block  
1099 New York Avenue N.W.  
Washington, DC 20001  
July 1988 – January 2009  
Partner (January 1991 – January 2009)  
Associate (July 1988 – December 1990)

Georgetown University Law Center  
600 New Jersey Avenue N.W.  
Washington, DC 20001  
Spring semesters: 1992 – 2008, except 2005  
Adjunct professor of law

American University Washington College of Law  
4801 Massachusetts Avenue N.W.  
Washington, DC 20016  
Spring semester 1995  
Adjunct professor of law

Office of the White House Counsel  
1600 Pennsylvania Avenue N.W.  
Washington, DC 20500  
May 1994 – July 1994  
Special Counsel to the President

Ennis Friedman & Bersoff  
1200 Seventeenth Street N.W.  
Washington, DC 20036  
September 1986 – June 1988  
Associate

Columbia University School of Law  
435 West 116<sup>th</sup> Street  
New York, N.Y. 10027  
September 1985 – August 1986  
Samuel Rubin Research Fellow

Cravath, Swaine & Moore  
825 Eighth Avenue  
New York, NY 10016  
May – June 1983  
Summer Associate

- iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have not served as a mediator or arbitrator.

## b. Describe:

- i. the general character of your law practice and indicate by date when its character has changed over the years.

In 1986, I joined Ennis, Friedman & Bersoff, a small litigation firm in Washington, D.C. I worked for Bruce Ennis and provided counsel and litigation advice to one the firm's principal clients. I also worked on First Amendment litigation.

In July 1988, I and most of the other lawyers in my firm joined the DC office of Jenner & Block, where I continued to work with Bruce Ennis on appellate and trial court matters. The other major component of my work during the first half of the 1990's was telecommunications litigation and regulatory work.

Starting in approximately 2000, I developed a more broad-based appellate practice while continuing to do telecommunications and technology-related work. My other major practice development during this time period was an increased focus on litigation involving questions of how copyright law would apply in emerging digital media.

I also took on an increasing managerial responsibilities at the firm in the 1990's and led the recruitment efforts of Jenner & Block's D.C. office. I became a co-managing partner of the D.C. office in 1997, was elected to the firm's governing Policy Committee in 2001, served as Chair of the firm's Diversity Committee beginning in 2006, and served as co-chair of the firm's Supreme Court practice group from 2000 to 2009.

In 2009, I began serving as an Associate Deputy Attorney General where I played a supervisory role on behalf of the Deputy Attorney General with regard to the civil litigating components at the Department of Justice. Since February of 2010, I have worked in the Office of the White House Counsel where I have assisted on some of the wide variety of issues that confront the Office.

- ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

While at Ennis, Friedman & Bersoff, I worked on issues for the American Psychological Association and on First Amendment matters, including a challenge under the 1984 Cable Act to a decision of the Commonwealth of Puerto Rico to bar the Playboy cable channel from the island's cable system.

At Jenner & Block, I represented the National Association of Broadcasters, which intervened to defend the constitutionality of the "must carry" provisions of the 1992 Cable Act in *Turner Broadcasting System v. FCC*. I also served as national coordinating counsel for MCI on litigation arising out of the Telecommunications Act of 1996. Additional cases that I handled at that time included *Verizon Communications v. FCC*, 535 U.S.

467 (2002); *Federal Communications Commission v. NextWave*, 537 U.S. 293 (2003) and *Verizon Communications v. Trinko*, 540 U.S. 398 (2004). In the copyright area, I handled *MGM Studios, Inc. v. Grokster*, 545 U.S. 913 (2005) and served as lead counsel for Viacom in an action filed in 2007 in the U.S. District Court for the Southern District of New York, alleging that YouTube should be held liable for copyright infringement for the unauthorized uploading of videos as to which Viacom owned the copyright.

While in the Deputy Attorney General's Office, I led a task force established to examine the government's use of the state secrets privilege in pending cases and to recommend any policy changes that were warranted based on that examination. I also supervised the work of the Civil Division, Antitrust Division, Tax Division, and Environmental and Natural Resources Division, and for a brief period the Civil Rights Division. Currently, in the Counsel's Office, I work on issues of separation of powers, including Congressional and other requests for documents and information. I also work on other legal policy issues and monitor litigation matters.

- c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

The large majority of my practice has been litigation, much of it at the appellate level. I have argued 12 cases in the United States Supreme Court, and participated as counsel for parties or *amici* in 52 other cases at the merits stage and 80 cases at the certiorari stage. I have argued approximately 35 cases in federal courts of appeals and state appellate courts, and participated in approximately 99 cases in those courts. At the trial court level, I do not have a precise count of the number of summary judgment motions, motions to dismiss and other motions I have argued in federal district courts and state courts. I estimate that number to be at least 30. In addition, I participated as trial counsel in two multi-month antitrust jury trials, *Ultronics v. Cox Cable of San Diego*, No. 88CV1718K (S.D. Cal. 1991), and *In re Lake Erie Iron Ore Litigation*, Master MDL File 587 (E.D. Pa. 1992). I also have participated in regulatory rulemaking proceedings and regulatory policy matters, principally before the Federal Communications Commission and principally related to implementation of the Telecommunications Act of 1996 and various broadcast media regulatory policy matters.

- i. Indicate the percentage of your practice in:
1. federal courts; 85%
  2. state courts of record; 5%
  3. other courts; 0%
  4. administrative agencies; 10%
- ii. Indicate the percentage of your practice in:

1. civil proceedings (including post-conviction representation of criminal defendants); 98%
  2. criminal proceedings; 2%.
- d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.
- i. What percentage of these trials were:
    1. jury; 4%
    2. non-jury. 96%

In the United States Supreme Court, I participated as counsel to a party in 34 merits cases; counsel to an amicus in 30 additional merits cases, and counsel to a party or an amicus at the certiorari stage in 80 cases. In the United States Courts of Appeals, I participated as counsel to a party in approximately 80 cases (32 of which I argued). I am not certain of the number of cases I tried to judgment in the district court. Of the cases I participated in at the trial level, all but a handful were either decided on summary judgment or were non-jury cases. I estimate that I was counsel in at least three dozen summary judgment motions, the large majority of which were cases arising under the Telecommunications Act of 1996 and involved judicial review of the implementation of the Act's requirements by state public utility commissions. I also served as counsel in numerous summary judgment motions and motions to dismiss on behalf of defendants in class actions or commercial disputes. I participated as counsel in two major antitrust jury trials that were tried to a verdict: *Ultronics v. Cox Cable of San Diego*, No. 88CV1718K (S.D. Cal. 1991), and *In re Lake Erie Iron Ore Litigation*, Master MDL File 587 (E.D. Pa. 1992).

- e. Describe your practice, if any, before the Supreme Court of the United States. Supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

Immediately prior to entering government service, I practiced law at Jenner & Block. A significant portion of my law practice involved Supreme Court work. From 2000 to 2009 I was co-chair of the Supreme Court practice group at the firm. I argued twelve cases at the Court, and participated as counsel to a party in 22 additional merits cases, as counsel to *amicus curiae* in 30 additional cases at the merits stage, and as counsel to a party or *amicus curiae* in 80 cases at the certiorari stage. Transcripts and briefs are provided.

**I(a): Argued Cases**

1. *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009) (No. 07-1529)
2. *Baze v. Rees*, 553 U.S. 35 (2008) (No. 07-5439)
3. *Schriro v. Landrigan*, 550 U.S. 465 (2007) (No. 05-1575)
4. *Howard Delivery Service, Inc. v. Zurich American Ins. Co.*, 547 U.S. 651 (2006) (No. 05-128)
5. *MGM Studios Inc. v. Grokster*, 545 U.S. 913 (2005) (No. 04-480)

6. *General Dynamics Land Systems v. Cline*, 540 U.S. 581 (2004) (No. 02-1080)
7. *Verizon Communications, Inc. v. Trinko*, 540 U.S. 398 (2004) (No. 02-682)
8. *Wiggins v. Smith*, 539 U.S. 510 (2003) (No. 02-311)
9. *Federal Communications Commission v. NextWave Communications*, 537 U.S. 293 (2003) (No. 01-653)
10. *Verizon Communications v. FCC*, 535 U.S. 467 (2002) (No. 00-511)
11. *Lonchar v. Thomas*, 517 U.S. 314 (1996) (No. 95-5015)
12. *MCI Communications v. AT&T*, 517 U.S. 314 (1996) (No. 93-356)

#### **I(b): Argued Cases, Oral Argument Transcriptions**

1. *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009) (No. 07-1529)
2. *Baze v. Rees*, 553 U.S. 35 (2008) (No. 07-5439)
3. *Schriro v. Landrigan*, 550 U.S. 465 (2007) (No. 05-1575)
4. *Howard Delivery Service, Inc. v. Zurich American Ins. Co.*, 547 U.S. 651 (2006) (No. 05-128)
5. *MGM Studios Inc. v. Grokster*, 545 U.S. 913 (2005) (No. 04-480)
6. *General Dynamics Land Systems v. Cline*, 540 U.S. 581 (2004) (No. 02-1080)
7. *Verizon Communications, Inc. v. Trinko*, 540 U.S. 398 (2004) (No. 02-682)
8. *Wiggins v. Smith*, 539 U.S. 510 (2003) (No. 02-311)
9. *Federal Communications Commission v. NextWave Communications*, 537 U.S. 293 (2003) (No. 01-653)
10. *Verizon Communications v. FCC*, 535 U.S. 467 (2002) (No. 00-511)
11. *Lonchar v. Thomas*, 517 U.S. 314 (1996) (No. 95-5015)
12. *MCI Communications v. AT&T*, 517 U.S. 314 (1996) (No. 93-356)

#### **II. Additional Merits Cases**

(\*indicates counsel of record)

1. *Nken v. Holder*, 129 S. Ct. 1749 (2009) (No. 08-681)
2. *Vermont v. Brillon*, 129 S. Ct. 1283 (2009) (No. 08-88)
3. *Hill v. McDonough*, 547 U.S. 573 (2006) (No. 05-8794)
4. *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1998) (No. 97-826)
5. *Greater New Orleans Broadcasters v. FCC*, 527 U.S. 173 (1999) (No. 98-387)
6. *United States Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999) (No. 98-404)
7. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) (No. 96-511)
8. *Turner Broadcasting System v. FCC*, 520 U.S. 180 (1997) (No. 95-992)
9. *McMillian v. Monroe County*, 520 U.S. 781 (1997) (No. 96-542)
10. *Foreman v. Dallas County*, 521 U.S. 979 (1997) (Nos. 96-987 and 96-1389)
11. *Adams v. Robertson*, 520 U.S. 83 (1996) (No. 95-1873)
12. *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996) (No. 94-1837)
13. *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (No. 93-1631)
14. *Swint v. Chambers County*, 514 U.S. 35 (1995) (No. 93-1636)
15. *American Airlines v. Wolens*, 513 U.S. 219 (1994) (No. 93-1286)
16. *Turner Broadcasting System v. FCC*, 512 U.S. 622 (1994) (No. 93-44)
17. *Johnson v. DeGrandy*, 512 U.S. 997 (1994) (No. 92-767)\*
18. *United States National Bank of Oregon v. Independent Ins. Agents of America*, 508 U.S. 49 (1993) (No. 92-484)\*
19. *Stevens v. Department of Treasury*, 500 U.S. 1 (1991) (No. 89-1821)

20. *Peel v. Attorney Registration and Disciplinary Committee of Illinois*, 496 U.S. 91 (1990) (No. 88-1775)
21. *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (No. 89-1279)
22. *Berkovitz v. United States*, 486 U.S. 531 (1988) (No. 87-498)

### III. Amicus Briefs (Merits Stage)

(\*indicates counsel of record)

1. *Cone v. Bell*, 129 S. Ct. 1769 (2008) (No. 07-1114)\*
2. *Harbison v. Bell*, 129 S. Ct. 1481 (2009) (No. 07-8521)\*
3. *Merrill Lynch Pierce Fenner & Smith v. Dabit*, 547 U.S. 71 (2006) (No. 04-1371)\*
4. *Randall v. Sorrell*, 548 U.S. 230 (2006) (No. 04-1528)\*
5. *Cherokee Nation & Shoshone-Paiute Tribes of the Duck Valley Reservation v. Thompson*, 543 U.S. 631 (2005) (Nos. 02-1472, 03-853)
6. *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005) (No. 03-855)
7. *United States v. Booker*, 543 U.S. 220 (2004) (No. 04-104)\*
8. *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618)\*
9. *Abdur-Rahman v. Bell*, 537 U.S. 88 (2002) (No. 01-9094)
10. *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (No. 00-191)\*
11. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000) (No. 98-683)\*
12. *Hunt v. Cromartie*, 526 U.S. 541 (1999) (No. 98-85)
13. *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (No. 97-371)\*
14. *Printz v. United States*, 521 U.S. 898 (1997) (No. 95-1178)\*
15. *Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Ry. Co.*, 516 U.S. 152 (1996) (No. 94-1592)
16. *Bush v. Vera*, 517 U.S. 952 (1996) (No. 94-805)
17. *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996) (No. 94-203)\*
18. *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995) (No. 94-226)
19. *Ibanez v. Florida Dep't of Professional Regulation*, 512 U.S. 136 (1994) (No. 93-639) \*
20. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (No. 93-1841)\*
21. *Shaw v. Reno*, 509 U.S. 630 (1993) (No. 92-357)\*
22. *CSX Transportation v. Easterwood*, 507 U.S. 658 (1993) (No. 91-1206)
23. *U.S. Department of Energy v. Ohio*, 503 U.S. 607 (1992) (No. 90-1341)
24. *Minnick v. Mississippi*, 498 U.S. 146 (1990) (No. 89-6332)
25. *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261 (1989) (No. 88-1503)
26. *Clemons v. Mississippi*, 494 U.S. 738 (1990) (No. 88-6873)
27. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (No. 87-1167)
28. *Fort Wayne Books v. Indiana*, 489 U.S. 46 (1989) (No. 87-470)
29. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (No. 86-6139)
30. *Patrick v. Burget*, 486 U.S. 94 (1988) (No. 86-1145)

### IV. Petitions for Certiorari

(\*indicates counsel of record)

1. *Cable News Network v. CSC Holdings*, No. 08-448 (2008)
2. *Montejo v. Louisiana*, No. 07-1529 (2008)\*
3. *Perfect 10, Inc. v. Visa*, No. 07-1026 (2008)\*
4. *Thacker v. FCC*, No. 07-803 (2008)
5. *Henneberry v. ING Capital Advisors*, No. 08M20 (2008)
6. *Taylor v. Crawford*, No. 07-303 (2007)\*

7. *Harvey v. Florida*, No. 06-1368 (2007)
8. *Leonard v. Simpson*, No. 06-1317 (2007)\*
9. *Cayuga Indian Nation v. Pataki*, No. 05-982 (2006)\*
10. *Nance v. United States*, No. 04-1484 (2005) \*
11. *National Association of Broadcasters v. FCC*, No. 04-1033 (2005)\*
12. *Comstock Resources v. Kennard*, No. 04-165 (2005)\*
13. *Morris Communications v. PGA Tour*, No. 04-266 (2004)\*
14. *RIAA v. Verizon*, No. 03-1579 (2004)\*
15. *AT&T v. United States Telecom Association*, No. 04-15 (2004)
16. *WorldCom v. Wisconsin Bell*, No. 03-603 (2004)\*
17. *WorldCom v. United States Telecom Association*, No. 02-858 (2003)
18. *Cousin v. Berry*, No. 02-1862 (2003)\*
19. *Scheiber v. Dolby Laboratories, Inc.*, No. 02-689 (2002)\*
20. *Wiggins v. Corcoran*, No. 02-311 (2002)\*
21. *Cohen v. United States*, No. 01-1234 (2002)
22. *Fulton County v. Webster*, No. 00-1174 (2001)\*
23. *WorldCom v. Verizon*, No. 00-555 (2000)\*
24. *NextWave Personal Communications v. FCC*, No. 99-1980, No. 00-447 (2000)
25. *American Airlines v. U.S. Department of Transportation*, No. 99-1745 (2000)
26. *Foreman v. Dallas County, Texas*, No. 99-1334 (2000)
27. *AT&T Corp. v. Cincinnati Bell*, No. 99-1249 (2000)
28. *Earles v. State Bd. of CPAs of Louisiana*, No. 98-385 (1999)\*
29. *MCI Telecommunications Corp. v. Iowa Utilities Board*, No. 97-82 (1998)
30. *MCI Telecommunications Corp. v. United Arab Emirates*, No. 96-434 (1996)\*
31. *Jolicoeur Furniture Co. v. Baldelli*, No. 95-153 (1995)\*
32. *Doe v. Kirchner*, No. 94-1644 (1995)
33. *Turner v. Jabe*, No. 94-1238 (1995)
34. *Bresnan Communications Company v. City of Huntsville, Alabama*, No. 94-377 (1994)
35. *City of Clearwater v. Church of Scientology*, No. 93-1603 (1994)
36. *American Airlines v. Wolens*, No. 92-249 (1993)
37. *Consumer Federation of America v. United States*, No. 93-318 (1993)
38. *MCI v. AT&T*, No. 92-1684 (1993)
39. *MCI v. Credit Builders of America*, No. 92-1566 (1993)
40. *Moore v. Regents of University of California*, No. 90-1037 (1991)\*
41. *Hill v. Mississippi State Employment Services*, No. 91-170 (1991)\*
42. *MCI Communications Corp. v. United States*, No. 90-9 (1990)
43. *Bankers Life & Casualty v. Crenshaw*, No. 85-1765 (1987)

#### V. Briefs in Opposition to Certiorari

(\*indicates counsel of record)

1. *Jewell v. Life Ins. Co. of North America*, No. 07-1121 (2008)
2. *Caley v. Gulfstream Aerospace Corp.*, No. 05-959 (2006)\*
3. *South Dakota v. Cummings*, No. 04-74 (2004)
4. *Ritcheson v. CC Services, Inc.*, No. 03-1097 (2004)
5. *Grid Radio v. Federal Communications Commission*, No. 01-1662 (2002)
6. *Satellite Broadcasting & Communications Ass'n v. FCC*, No. 01-1332 (2002)\*
7. *Federal Communications Comm'n v. NextWave Personal Communications*, No. 01-653 (2002)
8. *Evanns v. AT&T*, No. 00-1527 (2001)
9. *Qwest Corporation v. MCI WorldCom*, No. 00-214 (2000)

10. *GTE Services, Inc. v. FCC*, No. 99-1244 (2000) \*
11. *US West Communications v. FCC*, No. 99-869 (2000)
12. *BellSouth Corporation v. FCC*, No. 98-1046 (1999)\*
13. *SBC Communications v. FCC*, No. 98-652 (1999)\*
14. *Stuart v. Miller*, No. 97-719 (1998)\*
15. *Manning v. City of Chicago*, No. 96-32 (1996)
16. *Dumas v. Playboy Enterprises, Inc.*, No. 95-549 (1995)\*
17. *Turner Broadcasting System v. FCC*, No. 93-44 (1993)
18. *Ameritech v. AT&T*, No. 92-848 (1993)
19. *Bessemer & Lake Erie Ry Co. v. Republic Steel Corp.*, No. 93-643 (1993)
20. *Southern Pacific Transportation Co. v. Hernandez*, No. 91-293 (1991)\*
21. *Cruz v. Playboy Enterprises, Inc.*, No. 90-491 (1990)
22. *Clardy v. Sanders*, No. 89-440 (1989)
23. *Pacific Mutual Life Ins. Co. v. Haslip*, No. 89-1279 (1991)

#### VI. Amicus Brief (certiorari stage)

(\*indicates counsel of record)

1. *Cone v. Bell*, No. 07-1114 (2008)\*
  2. *T-Mobile USA v. Laster*, No. 07-976 (2008)\*
  3. *Irving N. v. Rhode Island Dep't of Youth & Families*, No. 06-603 (2007)\*
  4. *Randall v. Sorrell*, 548 U.S. 230 (2006) (No. 04-1528)\*
  5. *Pan American Energy v. Candlewood Timber Group*, No. 04-778 (2004)\*
  6. *Lovitt v. True*, No. 03-8751 (2003)\*
  7. *AT&T v. Ting*, No. 02-1521 (2003)\*
  8. *Alliant Energy Corporation v. Bridge*, No. 03-569 (2003)\*
  9. *Intel v. Advanced Micro Devices*, No. 02-572 (2002)\*
  10. *Housel v. Head*, No. 01-8889 (2002)
  11. *Walker County School Dist. v. Bennett*, No. 00-527 (2000)\*
  12. *City of Cincinnati v. Kruse*, No. 98-454 (1998)\*
  13. *Means v. Chilcutt*, No. 93-1663 (1994)\*
  14. *Holy Spirit Ass'n v. Molko*, No. 88-1600 (1989)
15. **Litigation:** Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:
- a. the date of representation;
  - b. the name of the court and the name of the judge or judges before whom the case was litigated; and
  - c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. *MGM Studios, Inc. v. Grokster*, 545 U.S. 913 (2005)

I served as lead counsel for the petitioners – a group that included the nation’s major motion picture studios and record companies – during 2004 and 2005 (and continued to represent these companies on remand to the district court). The question in the case was whether companies that operated for-profit peer-to-peer file sharing networks could be held liable for copyright infringement based on their active inducement of infringement by the users of their networks. Reversing the Ninth Circuit, the Court unanimously held that inducement was a valid theory of secondary copyright liability and that the network operators could be held liable for the infringement they induced.

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Phone: 310-312-6000

Richard Taranto (opposing counsel)  
Farr & Taranto  
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2. *General Dynamics Land Systems v. Cline*, 540 U.S. 581 (2004)

I represented General Dynamics. The question presented was whether the Age Discrimination in Employment Act prohibited employers from engaging in “reverse discrimination” in favor of older employees by, for example, providing flex time or part-time options for those workers but not for younger workers. The Court agreed with General Dynamics that the ADEA should not be read to prohibit such accommodations of older workers but should only bar discrimination that disfavors workers on the basis of old age.

Paul Clement (counsel for United States as amicus)  
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Mark Biggerman (opposing counsel)  
29325 Chagrin Boulevard  
Beachwood, OH 44122

Phone: 216-475-5500

3. *Wiggins v. Smith*, 539 U.S. 510 (2003)

I represented a death row inmate, Kevin Wiggins, in post-conviction proceedings, culminating in Supreme Court review, that focused on the claim that he was denied his Sixth Amendment right to the effective assistance of counsel because his trial counsel did not conduct any meaningful investigation into his background before deciding to forego putting on a mitigation defense at the sentencing phase of his murder trial. The Court's decision in the case established that a capital defendant's Sixth Amendment right to effective assistance of counsel encompasses the requirement that attorneys perform a reasonable and diligent investigation before making decisions about how best to defend their client in capital sentencing proceedings.

Gary E. Bair (opposing counsel)  
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Daniel Himmelfarb (counsel for United States as amicus)  
now at: Mayer Brown  
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4. *Federal Communications Commission v. NextWave Communications*, 537 U.S. 293 (2003)

I represented NextWave, a wireless telecommunications firm that had successfully bid on FCC licenses for wireless spectrum but had become insolvent and declared Chapter 11 bankruptcy before paying the FCC in full for the auction price. The case posed the question whether the FCC was required to respect the Bankruptcy Code provisions designed to give debtors breathing space to reorganize – particularly Section 525 of the Code, which provides that government agencies may not cancel licenses for failure to pay a dischargeable debt. The Court held that the FCC was bound by this requirement and could not reclaim spectrum licenses based on NextWave's bankruptcy.

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Thomas G. Hungar (co-counsel)  
Gibson, Dunn & Crutcher

1050 Connecticut Avenue NW  
Washington, DC 20036  
Phone: 202-955-8558

Laurence Tribe (counsel for amicus)  
Harvard Law School  
Cambridge, MA 02138  
Phone: 617-495-4620

5. *Verizon Communications v. Federal Communications Commission*, 535 U.S. 467 (2002)

I represented MCI and other telecommunications carriers in this case, which involved the legality and constitutionality of Federal Communications Commission rules setting the price at which incumbent local telephone companies were required to lease elements of their networks to competitors such as MCI under the terms of the Telecommunications Act of 1996. MCI and other competitive carriers had intervened to defend the FCC's rules. The Court upheld the rules against challenges that they were arbitrary and capricious and that they violated the Fifth Amendment because they did not provide sufficient compensation.

Theodore Olson (counsel for the Federal Communications Commission)  
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William P. Barr, Verizon Communications (opposing counsel)  
Home: 1200 Daleview Drive  
McLean, Virginia 22102

David Carpenter (counsel for AT&T)  
Sidley Austin  
One South Dearborn  
Chicago, IL 60603  
Phone: 312-853-7327

Peter Keisler (counsel for AT&T)  
Sidley Austin  
1501 K Street N.W.  
Washington, DC 20005  
Phone: 202-736-8027

6. *McDonnell-Douglas Corporation v. United States*, 567 F.3d 1340 (CA Fed 2009);  
*McDonnell-Douglas Corporation v. United States*, 323 F.3d 1006 (CA Fed 2003)

I represented General Dynamics over a ten-year period, which included the two Federal Circuit appeals listed above (Michel, Moore & Huff, JJ. in 2009; Michel, Clevenger & Linn, JJ. in 2003) in a major government contracts case challenging the Defense Department's conclusion that General Dynamics had defaulted on the design and construction of the A-12 stealth aircraft, resulting in a multi-billion dollar damages liability. The case established important legal principles regarding the standard for deciding whether a contractor has defaulted on its contractual obligations.

Michael Hertz and Brian Snee (opposing counsel)  
United States Department of Justice  
950 Pennsylvania Avenue NW  
Washington, DC 20543  
Phone (Hertz): 202-514-3306

Charles Cooper (counsel for Boeing)  
Cooper & Kirk  
1523 New Hampshire Avenue NW  
Washington, DC 20036  
Phone: 202-220-9600

7. *L-3 Communications v. OSI Systems*, Nos. 07-1314-cv, 07-1552-cv, 2008 WL 2595176 (CA2 2008)

I represented L-3 communications in the U.S. Court of Appeals for the Second Circuit in this commercial dispute (Cabranes, Katzmman, and Cardamone, JJ.). The Second Circuit overturned a damages verdict of more than \$125 million against L-3. The appeals court agreed with L-3's argument that the district court had improperly allowed OSI Systems to convert a contractual dispute based on arms-length bargaining into a breach of fiduciary duty case with punitive damages.

Carter Phillips (opposing counsel)  
Sidley Austin  
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Washington, DC 20005  
Phone: 202-736-8270

8. *Satellite Broadcasting & Communications Ass'n v. Federal Communications Commission*, 275 F.3d 337 (CA4 2001), *cert. denied*, 536 U.S. 922 (2002)

I represented the National Association of Broadcasters in this case involving a First Amendment challenge to the Satellite Home Viewer Improvement Act, a statute that required satellite broadcasters such as DirecTV to carry all local broadcast stations as a package in a given geographic locale if they carried any broadcaster in that locale. The broadcasters intervened in the case to defend the constitutionality of the statute. The Fourth Circuit (Michael, Widener, Neimeyer, JJ.) upheld the law on the ground that Congress could constitutionally condition its grant of a compulsory copyright license to transmit local broadcast stations on the requirement that a satellite broadcaster carry all local channels.

Charles Cooper (opposing counsel)  
Cooper & Kirk  
1523 New Hampshire Avenue NW  
Washington, DC 20036  
Phone: 202-220-9600

9. *Viacom v. YouTube*, No. 07 Civ. 2103 (S.D.N.Y, case filed April 2007)

I represented Viacom in the district court proceedings in this intellectual property test case alleging that YouTube infringed Viacom's copyright in video programming, and that

YouTube did not have immunity from damages for such conduct under the Digital Millennium Copyright Act. The case, before Judge Louis Stanton of the U.S. District Court for the Southern District of New York, was still in discovery when I left private practice to join the Department of Justice in 2009. After my departure, the district court ruled on summary judgment that YouTube did have immunity under the DMCA. The case is now on appeal.

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Andrew Schapiro (opposing counsel)  
 Mayer Brown  
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 New York, NY 10019  
 Phone: 212-506-2172

10. MCI Litigation under the 1996 Telecommunications Act

During the period 1997-2001, I represented MCI as national coordinating counsel for litigation arising out of the Telecommunications Act of 1996. In this role, I served as lead counsel in dozens of summary judgment proceedings around the country involving federal district court review of state public utility commission decisions implementing the local competition requirements of the Telecommunications Act of 1996. I argued 10 to 15 of these cases in U.S. district courts around the country, and participated in appeals of these cases as well. In this role, I also argued several cases in the U.S. courts of appeals regarding the legality and constitutionality of various aspects of the FCC's rules implementing the Act on a national level.

These cases involved many opposing counsel and co-counsel. The two with whom I had most frequent contact were:

Michael Kellogg (opposing counsel)  
 Kellogg, Huber, Hansen, Todd, Evans & Figal  
 1615 M Street NW  
 Washington, DC 20036  
 Phone: 202-326-7900

John Thorne (opposing counsel)  
 Verizon Communications  
 1515 North Courthouse Road  
 Arlington, VA 22201  
 Phone: 703-351-3900

16. **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s).

(Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

I have never been a registered lobbyist.

The majority of my practice has been in litigation, much of it at the appellate level. The subject matter of these cases covered constitutional law, administrative law, telecommunications law, antitrust law, copyright law, and bankruptcy law. The court of appeals aspect of my appellate practice involved filing briefs in all federal courts of appeals and presenting oral arguments in most of the circuits. My Supreme Court practice involved oral arguments and briefing the cases on the merits, as well as seeking and opposing Supreme Court review. Additionally, I helped prepare other counsel to argue before the Court and counseled clients on the impact of specific Supreme Court rulings.

My most significant non-trial matter was negotiation of a landmark consent decree in 1995 in *Thompson v. HUD*, a class action filed in U.S. District Court for the District of Maryland seeking to desegregate the public housing of the City of Baltimore. In the latter part of 1995, I devoted several hundred hours of time negotiating a complex consent decree to resolve a preliminary injunction motion in that matter. The negotiations involved the U.S. Department of Housing and Urban Development, the Baltimore City Housing Authority, and the governments of the counties surrounding Baltimore City. As a result of the decree, \$370 million dollars of federal money was provided to support a plan by the City to demolish its existing high rise public housing projects and replace them with low-density housing and related community development projects.

17. **Teaching:** What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

From 1992 through 2008, I taught an advanced constitutional law seminar each spring entitled Theories of Free Speech at the Georgetown University Law Center. Copies of syllabi from 1997 through 2008 are provided (with the exception of 2005, when I did not teach). I do not have syllabi from the earlier years, but they are substantially the same as those provided. During the spring of 1995, I also taught a survey course in First Amendment law at the Washington College of Law, American University. I cannot locate the syllabus. The case book I used for the course at Washington College of Law was Steven Shiffrin, *First Amendment: Cases, Comments, Questions*.

18. **Deferred Income/ Future Benefits:** List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

I participate in the Thrift Savings Plan.

19. **Outside Commitments During Service:** Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service? If so, explain.

No.

20. **Sources of Income:** List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, licensing fees, honoraria, and other items exceeding \$500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

See attached Financial Disclosure Report.

21. **Statement of Net Worth:** Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Net Worth Statement.

22. **Potential Conflicts of Interest:**

- a. Identify the family members or other persons, parties, affiliations, pending and categories of litigation, financial arrangements or other factors that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

In connection with the nomination process, I have consulted with the Office of Government Ethics and the Department of Justice's designated agency ethics official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of an ethics agreement that I have entered into with the Department's designated agency ethics official.

- b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

In connection with the nomination process, I have consulted with the Office of Government Ethics and the Department of Justice's designated agency ethics official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of the ethics agreement that I have entered into with the Department's designated agency ethics official.

23. **Pro Bono Work:** An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each. If you are not an attorney, please use this opportunity to report significant charitable and volunteer work you may have done.

During my career in private practice, I endeavored to devote at least 5% of my time to pro bono work each year. To the best of my recollection, I met or exceeded that goal in each year. From 1999 through 2008, and in most of the years prior to 1999, I billed in excess of 200 pro bono hours annually.

A significant portion of my pro bono time was devoted to post-conviction representation of death row inmates in state and federal post-conviction proceedings, which focused principally (but not exclusively) on issues of effective representation of counsel under the Sixth Amendment, based on my belief that the fairness and integrity of our system of capital punishment depends critically on the quality of the representation. For example, I represented a habeas petitioner named Kevin Wiggins over a ten-year span in state and federal habeas corpus proceedings, culminating in a U.S. Supreme Court decision in *Wiggins v. Smith* clarifying the standards for effective assistance of counsel in capital sentencing proceedings. I also represented inmates Gregory Montecarlo Jones in Mississippi (*Jones v. State*, 602 So. 2d 1170 (Miss. 1992)) and John Michael Davis in Georgia (*Davis v. Zant*, 36 F.3d 1538 (CA11 1994)) in proceedings over several years that culminated in successful appeals. In more recent years I was asked, and agreed, to handle the following capital punishment cases on a pro bono basis in the U.S. Supreme Court: *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009); *Landrigan v. Schriro*, 550 U.S. 465 (2007); *Baze v. Rees*, 553 U.S. 35 (2008). *Montejo* and *Landrigan* raised right-to-counsel issues of the kind that have been the focus of my pro bono efforts in capital cases. *Baze* involved the constitutionality of lethal injection procedures.

I also have done pro bono work in other areas. In 2007 and 2008, I assisted the organization Teach For America, in litigation and with counseling, on issues related to alternative paths to certification for teachers under the No Child Left Behind law. For several years, I represented the Superior Court Judges of the District of Columbia on a pro bono basis defending a constitutional challenge brought to their efforts to reform the attorney appointment system to ensure qualified representation for juveniles in abuse and neglect proceedings in the DC Courts (*Roth v. King*, 449 F.3d 1272 (CADDC 2006)). During 1994 and 1995, I spent a significant amount of time negotiating a consent decree to resolve a preliminary injunction in a housing discrimination case, *Thompson v. HUD*, which resulted in a plan to demolish the City of Baltimore's high rise housing projects and replace them with low-density housing and support services for public housing residents. During the 1990s, I did some work with human rights organizations seeking political asylum for foreign dissidents, including a successful effort on behalf of a dissident scientist seeking asylum from the Peoples Republic of China. Over the years I also filed pro bono *amicus* briefs in the Supreme Court and other courts for a range of clients on a range of issues, including: for Members of Congress in cases involving the constitutionality of campaign finance reform (*Randall v. Sorrell*; *FEC v. Colorado Republicans*; and *Nixon v. Shrink Missouri*); for the Washington Legal Foundation (*Merrill Lynch v. Dabit* (pre-emption of state securities law claims); *United States v. Booker* (sentencing) and *Alliant Energy v. Bridge* (extraterritoriality)); for the Lawyers Committee for Civil Rights in a Voting Rights Act case (*Morse v. Republican Party of Virginia*); and for numerous other organizations.

Donald Verrilli

**FINANCIAL STATEMENT**  
**NET WORTH**

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks	1	053	464	Notes payable to banks-secured			0
U.S. Government securities-add schedule			0	Notes payable to banks-unsecured			0
Listed securities-add schedule	2	289	080	Notes payable to relatives			0
Unlisted securities-add schedule			0	Notes payable to others			0
Accounts and notes receivable:			0	Accounts and bills due			0
Due from relatives and friends			0	Unpaid income tax			0
Due from others			0	Other unpaid income and interest			0
Doubtful			0	Real estate mortgages payable-see schedule		292	000
Real estate owned-see schedule	1	200	000	Chattel mortgages and other liens payable			0
Real estate mortgages receivable			0	Other debts-itemize:			0
Autos and other personal property		50	000				
Cash value-life insurance		51	000				
Other assets itemize:			0				
				Total liabilities		292	000
				Net Worth	4	351	544
Total Assets	4	643	544	Total liabilities and net worth	4	643	544
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor			0	Are any assets pledged? (Add schedule)			no
On leases or contracts			0	Are you defendant in any suits or legal actions?			no
Legal Claims			0	Have you ever taken bankruptcy?			no
Provision for Federal Income Tax			0				
Other special debt			0				

**ASSETS****Listed Securities****CDs:**

Ally Bank CD	\$199,500
American Express Bank CD	\$100,087
American Express Centurian Bank CD	\$100,266
Citizens Bank MI CD	\$100,272
Discover Bank DE CD	\$100,764
GE Money Bank Utah CD	\$100,800
Sallie Mae Bank UT CD	\$ 93,325
Bank of America NA CD	\$125,950

**Mutual Funds:**

Black Rock Global Allocation	\$ 90,000
Calamos Convertible Fund	\$ 35,000
Calamos Market Neutral Income Fund	\$ 20,000
Henderson International Opportunities	\$ 90,000
Ivy Asset Strategy Fund	\$ 89,000
Ivy Capital Appreciation Fund	\$ 96,000
Loomis Sayles Strategic Income Fund	\$ 39,500
Nuveen Multi Cap Value Fund	\$ 81,000
Pimco Funds – All Asset All Auth	\$ 49,000
Thornburg Int'l Value Fund	\$ 95,000
Touchstone Mid Cap Growth Fund	\$ 62,000
Touchstone Sands Cap Select Fund	\$104,000
American Funds – Growth Fund of America	\$ 35,700

American Funds – Income Fund of America \$ 62,800  
 American Funds – Wash. Mutual Inv. Fund \$ 50,000

**Bonds:**

Chicago, IL BOE SCH Reform 0-CPN	\$ 6,444
Denton TX Indep. Sch. Dist. RFDG	\$ 9,075
Dist. of Columbia MBIA Unltd G/O	\$ 9,225
Harris Co. TX G/O Rev Ref MBID	\$ 7,799
Hilliard OH Sch. Dist. Construction	\$ 9,214
Keller TX Ind. Sch. Dist. RFDG	\$ 9,666
Lancaster Cty PA Ser. B G/O	\$ 7,899
Loveland OH City Sch. Dist.	\$ 9,732
Michigan City Ind Area-Wide FGIC B/E	\$ 6,042
Michigan State Bldg Auth Rev RFDG	\$ 6,941
Minister OH Local School Dist. RFDG	\$ 8,899
Newman Crews Landing Sch. Dist.	\$ 6,604
North Slope Borough Alaska Ser. A	\$ 9,620
Southern CA PPA PJRV Public Power Rev	\$ 9,692
Sussex Cty. NJ Mun. Utils Auth.	\$ 8,434
Washington State G/O College Savings	\$ 9,637
Washington State G/O Ser 5	\$ 8,441
Washington State RFDG Ser R-97A	\$ 8,291

**401k:**

Fidelity Europac Growth Fund	\$ 55,000
Fidelity Davis NY Venture Fund	\$ 70,000
Fidelity Freedom 2020	\$ 20,000

Fidelity Freedom 2030	\$275,000
Fidelity Growth Company Fund	\$125,000
Fidelity Value Fund	\$ 57,000
Fidelity Retirement Govt Money Market	\$110,000
Fidelity US Bond Index Fund	\$203,000

#### **529 College Fund**

American Funds Money Market 529-A	\$ 6,630
Income Fund of America – 529C	\$ 29,000
Short Term Bond Fund of America – 529C	\$ 2,795

#### **Other:**

MetLife Variable Annuity	\$185,000
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#### **Real Estate Owned**

Residence in Washington, D.C.	\$1,200,000
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#### **Real Estate Mortgages**

Bank of America Mortgage	\$250,000
Citibank Line of Credit	\$ 42,000

SP 276 (Rev. 01/2009) **Executive Branch Personnel PUBLIC FINANCIAL DISCLOSURE REPORT** Form Approved: OMB No. 3209-0001

5 C.F.R. Part 2634  
U.S. Office of Government Ethics

Name of Appointing Authority, Division or Agency (Attach Dir. Title)	Reporting Status (Check Appropriate Boxes)	Incumbent <input type="checkbox"/>	Calendar Year Covered by Report	New Entrant, Nominee, or Candidate <input checked="" type="checkbox"/>	Termination Filer <input type="checkbox"/>	Termination Date (If Applicable) (Month, Day, Year)	<b>Fee for Late Filing</b> Any individual who is required to file this report and does so more than 30 days after the date the report is required to be filed, or if an extension is granted, more than 30 days after the last day of the filing extension period, shall be subject to a \$200 fee.
Last Name	First Name and Middle Initial						
Reporting Individual's Name	Title of Position		Department or Agency (If Applicable)				
Position for Which Filing	Solicitor General		Department of Justice				
Location of Present Office (or Forwarding Address)	Address (Number, Street, City, State, and ZIP Code)			Telephone No. (Include Area Code)			
Title of Position(s) and Dates Held	Deputy Counsel to the President (June 2010 - present) Senior Counsel to the President (February 2010 - June 2010) Associate Deputy Attorney General, U.S. Department of Justice (February 2009 - January 2010)			Reporting Periods Incumbents: The reporting period is the preceding calendar year except Part II of Schedule C and Part I of Schedule D where you must also include the filing year up to the date you file. Part II of Schedule D is not applicable.			
Name of Congressional Committee Considering Nomination	Do you intend to create a Qualified Diversified Trust?			Termination Filer: The reporting period begins at the end of the period covered by your previous filing and ends at the date of termination. Part II of Schedule D is not applicable.			
Committee on Judiciary	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No			Nominees, New Entrants and Candidates for President and Vice President:			
Certification	Signature of Reporting Individual		Date (Month, Day, Year)				
I CERTIFY that the statements I have made are true, complete and correct to the best of my knowledge.			7/21/11				
Other Reviewer (If checked by Agency)	Signature of Other Reviewer		Date (Month, Day, Year)				
			11/31/11				
Agency Ethics Official's Opinion	Signature of Designated Agency Ethics Official/Reviewing Official		Date (Month, Day, Year)				
On the basis of information contained in this report, I conclude that the filer is in compliance with applicable laws and regulations, unless so indicated in the box below.			1/31/2011				
Office of Government Ethics Use Only	Signature		Date (Month, Day, Year)				
Comments of Reviewing Officials (If additional space is required, use the reverse side of this sheet)							
(Check box if filing extension granted & indicate number of days) <input type="checkbox"/>							
(Check box if comments are contained on the reverse side) <input type="checkbox"/>							
Agency Use Only							
OGE Use Only							

SP 278 (Rev. 03/2000)  
5 C.F.R. Part 2634  
U.S. Office of Government Ethics

Reporting Individual's Name		SCHEDULE A										Page Number											
Verrill, Donald B., Jr.												2 of 26											
Assets and Income		Valuation of Assets at close of reporting period										Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.											
BLOCK A		BLOCK B										BLOCK C											
<p>For you, your spouse, and dependent children, report each asset held for investment or the production of income which had a fair market value exceeding \$1,000 at the close of the reporting period, or which generated more than \$200 in income during the reporting period, together with such income.</p> <p>For yourself, also report the source and actual amount of earned income exceeding \$200 (other than from the U.S. Government). For your spouse, report the source but not the amount of earned income of more than \$1,000 (except report the actual amount of any honoraria over \$200 of your spouse).</p> <p>None <input type="checkbox"/></p>												Type	Amount	Date (Mo., Day, Yr.) Only if Honoraria									
												None (or less than \$201)											
Examples		\$1,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$250,000	\$250,001 - \$500,000	\$500,001 - \$1,000,000	\$1,000,001 - \$25,000,000	\$25,000,001 - \$50,000,000	Over \$50,000,000	Investment Trust	IRA/Keogh	Interest	None (or less than \$201)	\$1,001 - \$1,500	\$1,501 - \$5,000	\$5,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	Over \$100,000*	Over \$1,000,000*	Over \$5,000,000	Other Income (Specify Type & Actual Amount)
Central Airlines Custodian																							
Doe Jones & Smith, (Homeown, State)																							Low Partnership Income (\$1,000)
Hempstead Realty Fund																							
Bk. HomeTrust SAC Index Fund																							
1 Morgan Stanley Smith Barney Blackrock Global Allocation Fund				X						X		X			X								
2 Morgan Stanley Smith Barney Calamos Convertible Fund CL I				X						X		X			X								
3 Morgan Stanley Smith Barney Calamos Market Neutral Income Fund CL I				X						X		X			X								
4 Morgan Stanley Smith Barney Henderson Intl Opportunites Fund CL W				X						X		X			X								
5 Morgan Stanley Smith Barney Ivy Asset Strategy Fund Class I				X						X		X			X								
6 Morgan Stanley Smith Barney Ivy Capital Appreciation Fund CL I				X						X		X			X								

\* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.



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Reporting Individual's Name		SCHEDULE A continued (Use only if needed)										Page Number					
Varril, Donald B., Jr.												4 of 26					
Assets and Income		Valuation of Assets at close of reporting period							Income: type and amount. If "None for less than \$201" is checked, no other entry is needed in Block C for that item.								
BLOCK A		BLOCK B							BLOCK C								
									Type		Amount			Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honorary		
1	Dist. of Columbia MBIA Unlted G/O Bond	X															
2	Harris County TX G/O Rev Ref MGD Bond	X															
3	Hilliard Ohio School District Construction Bond	X															
4	Keller TX Ind. School Dist. RFDG Bond	X															
5	Lancaster County PA Ser B G/O Bond	X															
6	Loveland Ohio City School Dist. Bond	X															
7	Michigan City Ind Area-Wide FGIC B/E O-CPN Rev Bond	X															
8	Michigan State Bldg Auth Reve RFDG Bond	X															
9	Minister Ohio Local School Dist. RFDG Bond	X															

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Reporting Individual's Name Venill, Donald D., Jr.	<b>SCHEDULE A continued</b> (Use only if needed)	Page Number 5 of 26
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Assets and Income	Valuation of Assets at close of reporting period										Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.													
	BLOCK B										BLOCK C													
											Type	Amount									Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria		
	None (or less than \$201)	\$1,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$250,000	\$250,001 - \$500,000	Over \$1,000,000*	None (or less than \$201)	\$1,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$250,000	\$250,001 - \$500,000	Over \$1,000,000*	None (or less than \$201)	\$1,001 - \$2,500	\$2,501 - \$5,000	\$5,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000			Over \$1,000,000*	Over \$15,000,000
1		X													X									
2		X													X									
3		X													X									
4		X													X									
5		X													X									
6		X													X									
7		X													X									
8		X													X									
9			X												X									

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Reporting Individual's Name		SCHEDULE A continued (Use only if needed)												Page Number												
Verrill, Donald B., Jr.														8 of 26												
Assets and Income	Valuation of Assets at close of reporting period										Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.															
BLOCK A	BLOCK B										BLOCK C															
	\$1,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$250,000	\$250,001 - \$500,000	Over \$1,000,000*	\$1,000,001 - \$15,000,000	\$15,000,001 - \$50,000,000	Over \$50,000,000	Employee's Trust	Charitable Contribution	Gifts	Dividends	Interest	None (or less than \$201)	\$1,001 - \$2,500	\$2,501 - \$5,000	\$5,001 - \$15,000	\$15,001 - \$50,000	Over \$50,000	Over \$1,000,000*	Over \$5,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria		
1															X											
2																										
3																										
4																										
5																										
6																										
7																										
8																										
9																										

\* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.

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Reporting individual's Name Verrill, Donald B., Jr.		SCHEDULE A continued (Use only if needed)										Page Number 7 of 28														
BLOCK A Assets and Income	BLOCK B Valuation of Assets at close of reporting period						BLOCK C Income: type and amount, if "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.						Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honorary												
	\$1,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$250,000	\$250,001 - \$500,000	Over \$1,000,000*	None (or less than \$201)	Interest	Dividends	Capital Gains	Other	None (or less than \$201)			\$1,001 - \$2,500	\$2,501 - \$5,000	\$5,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	Over \$1,000,000*	Over \$15,000,000					
1. MetLife Investors USA Variable Annuity Ser. I - MetLife Balanced Strategy Portfolio Fund																										
2. Citibank Bank Deposit Program (FDIC insured sweep account)																										
3. American Funds Growth Fund of America																										
4. American Funds Income Fund of America																										
5. American Funds Washington Mutual Investors Fund																										
6. American Funds (College America) Money Market Fund (529a)																										
7. American Funds (College America) Income Fund of America (529-C)																										
8. American Funds (College America) Short-Term Bond Fund of America (529-C)																										
9. Fidelity (Janitor & Block 401k) Davis NY Ventures Fund																										

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Reporting Individual's Name		SCHEDULE A continued (Use only if needed)										Page Number						
Verrill, Donald B., Jr.												9 of 26						
Assets and Income		Valuation of Assets at close of reporting period						Income: type and amount. If "None for less than \$201" is checked, no other entry is needed in Block C for that item.										
BLOCK A		BLOCK B						BLOCK C										
		None for less than \$1,001	\$1,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$500,000	Over \$500,000*	None for less than \$201	Dividends	Interest	None for less than \$201	\$1,001 - \$2,500	\$2,501 - \$5,000	\$5,001 - \$15,000	\$15,001 - \$50,000	Over \$50,000*	Other (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
1 Intentionally Left Blank																		
2 Hartford Calif. Lt. High Sch. Muni Bond			X					X										
3 Citibank Bank Deposit Program (FDIC insured sweep account)			X					X										
4 TIAA CREF Tax Deferred Annuity (spouse) TIAA Traditional			X								X							
5 TIAA CREF Tax Deferred Annuity (spouse) TIAA Real Estate			X								X							
6 TIAA CREF Tax Deferred Annuity (spouse) CREF Stock			X								X							
7 TIAA CREF Tax Deferred Annuity (spouse) CREF Global Equities			X								X							
8 TIAA CREF Tax Deferred Annuity (spouse) CREF Growth			X								X							
9 New York State Teachers Health Care Benefit (spouse is beneficiary of mother's pension benefit)																	\$1,000.00	

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Reporting Individual's Name		SCHEDULE A continued (Use only if needed)										Page Number													
Verrill, Donald B., Jr.												10 of 26													
Assets and Income		Valuation of Assets at close of reporting period					Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.					Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria												
BLOCK A		BLOCK B					BLOCK C																		
		\$1,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$250,000	\$250,001 - \$500,000	Over \$1,000,000*	Over \$5,000,000	Over \$10,000,000	Excluded Trust	Excluded Trust	Dividends	Interest	None (or less than \$201)	\$1,001 - \$2,500	\$2,501 - \$5,000	\$5,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$250,000	Over \$1,000,000*	Over \$5,000,000			
1	MS Managed Asset Assets (pg 10.1 - pg 22.9) American Express Bank	X										X		X											
2	American Express Centurion Bank	X										X		X											
3	Citizens Bank	X										X		X											
4	Discover Bank	X										X		X											
5	GE Money Bank	X										X		X											
6	Sallie Mae Bank	X										X		X											
7	Huntington Bank	X										X		X											
8	Mid First Bank	X										X		X											
9	American Express CO	X										X		X											

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Reporting individual's name Verrill, Donald B., Jr.		SCHEDULE A continued (Use only if needed)										Page Number 11 of 26								
Assets and Income		Valuation of Assets at close of reporting period						Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.												
BLOCK A		BLOCK B						BLOCK C												
		\$1,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$500,000	\$500,001 - \$1,000,000	Over \$1,000,000*	None (or less than \$201)	Dividends	Interest	None (or less than \$201)	\$1,001 - \$2,500	\$2,501 - \$5,000	\$5,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	Over \$100,000*	Over \$5,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
1	Goldman Sachs CD	X							X											
2	Bank of America CD	X							X											
3	Barrick Gold Corp	X							X											
4	Abergen Inc.	X							X											
5	BBAT Corp	X							X											
6	Franklin Resources Inc.	X							X											
7	Caterpillar Inc.	X							X											
8	Carnival Corp	X							X											
9	Cliffs Natural Resources	X							X											

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Reporting Individual's Name Verrell, Donald B., Jr.	<b>SCHEDULE A continued</b> (Use only if needed)	Page Number 12 of 28
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Assets and Income  BLOCK A	Valuation of Assets at close of reporting period  BLOCK B							Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.  BLOCK C												
	None	\$1,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$500,000	\$500,001 - \$1,000,000*	\$1,000,001 - \$5,000,000	Over \$5,000,000	Type		Amount								Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.)  Only if Honorary
									None (or less than \$201)	None										
1	<input checked="" type="checkbox"/>							<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		
2	<input checked="" type="checkbox"/>							<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		
3	<input checked="" type="checkbox"/>							<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		
4	<input checked="" type="checkbox"/>							<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		
5	<input checked="" type="checkbox"/>							<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		
6	<input checked="" type="checkbox"/>							<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		
7	<input checked="" type="checkbox"/>							<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		
8	<input checked="" type="checkbox"/>							<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		
9	<input checked="" type="checkbox"/>							<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		

\* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.

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Reporting Individual's Name Verrill, Donald B., Jr.		SCHEDULE A continued (Use only if needed)										Page Number 13 of 26						
Assets and Income		Valuation of Assets at close of reporting period						Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.										
BLOCK A		BLOCK B						BLOCK C										
		\$1,001 - \$15,000		\$15,001 - \$50,000		\$50,001 - \$100,000		\$100,001 - \$250,000		Over \$1,000,000*		Type		Amount		Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria	
		\$15,001 - \$50,000		\$50,001 - \$100,000		\$100,001 - \$250,000		Over \$1,000,000*		Type		Amount						
1	J. Crew Group Inc.	X																
2	KeyCorp	X																
3	Kohls Corp	X																
4	Marricott Int'l. Inc.	X																
5	MetLife Inc.	X																
6	Merck & Co.	X																
7	Morgan Stanley	X																
8	M & T Bank Corp	X																
9	Annaly Capital Mgt Inc	X																

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Reporting Individual's Name		SCHEDULE A continued (Use only if needed)										Page Number						
Verrill, Donald D., Jr.												15 of 28						
Assets and Income		Valuation of Assets at close of reporting period					Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.											
BLOCK A		BLOCK B					BLOCK C											
		\$1,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$500,000	Over \$1,000,000*	None	Dividends	Interest	None (or less than \$201)	\$1,001 - \$2,500	\$2,501 - \$5,000	\$5,001 - \$15,000	\$15,001 - \$100,000	Over \$1,000,000*	Over \$5,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
1	Zions Bancorp	X									X							
2	Bayer A G Sponsored ADR	X							X									
3	BG Group PLC Spon ADR	X									X							
4	Canon Inc	X									X							
5	Carrefour SA	X									X							
6	Fastens Group Ltd	X									X							
7	Hong Kong Electric Hldgs	X									X							
8	Sasol Ltd. Spon ADR	X									X							
9	Seven & I Hldgs Co	X									X							

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Reporting Individual's Name		SCHEDULE A continued (Use only if needed)										Page Number								
Verrill, Donald D., Jr.												10 of 26								
Assets and Income		Valuation of Assets at close of reporting period					Income: type and amount. If "None for less than \$201" is checked, no other entry is needed in Block C for that item.													
BLOCK A		BLOCK B					BLOCK C													
		\$1,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$500,000	Over \$500,000*	None (or less than \$201)	Dividends	Interest	Capital Gains	Other	None (or less than \$201)	\$1,001 - \$2,500	\$2,501 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$500,000*	Over \$500,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
1	Telefonica S.A. Spon ADR	X					X													
2	Unilever PLC Spon ADR						X													
3	United Overseas Bank						X													
4	Apple Inc.	X					X													
5	American Mobil S.A.B.						X													
6	Amazon Com Inc.	X					X													
7	Broadcom Corp	X					X													
8	Salesforce Com Inc	X					X													
9	FMC Technologies Inc	X					X													

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Reporting Individual's Name		SCHEDULE A continued (Use only if needed)										Page Number											
Venill, Donald B., Jr.												17 of 26											
BLOCK A	BLOCK B							BLOCK C															
	Valuation of Assets at close of reporting period							Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.															
	\$1,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$250,000	\$250,001 - \$500,000	Over \$1,000,000*	\$5,000,001 - \$25,000,000	Over \$25,000,000	Encumbered Trust	None (or less than \$201)	Dividends	Interest	None (or less than \$201)	\$1,001 - \$2,500	\$2,501 - \$5,000	\$5,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$250,000	Over \$250,000*	Over \$5,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honorary
1	Google Inc.	X											X										
2	VWV Grainger Inc.	X											X										
3	Intercontinental Exchange Inc.	X											X										
4	Bumina Inc.	X											X										
5	Intuitive Surgical Inc.	X											X										
6	Las Vegas Semts Corp	X											X										
7	Nisa Inc	X											X										
8	Starbucks Corp	X											X										
9	Stryker Corp	X											X										

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Reporting Individual's Name		SCHEDULE A continued (Use only if needed)										Page Number					
Vernli, Donald B., Jr.												16 of 26					
Assets and Income	Valuation of Assets at close of reporting period							Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.					Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria			
	BLOCK A	BLOCK B							BLOCK C								
	\$1,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$250,000	\$250,001 - \$500,000	Over \$1,000,000*	\$5,000,001 - \$25,000,000	Over \$50,000,000	Dividend	Interest	None (or less than \$201)	\$1,001 - \$2,500	\$2,501 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	Over \$1,000,000*	Over \$5,000,000
1 Visa Inc	X											X					
2 Varian Medical Systems Inc	X											X					
3 VMware Inc	X											X					
4 Ameriprise Financial	X											X					
5 Abercrombie & Fitch Co	X											X					
6 Alpha Natural Resources Inc	X											X					
7 Bally Technologies Inc	X											X					
8 Chemera Invest Corp	X											X					
9 Continental Resources Inc	X											X					

\* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.

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Reporting Individual's Name Venill, Donald B., Jr.		SCHEDULE A continued (Use only if needed)										Page Number 19 of 26						
Assets and Income	BLOCK A	Valuation of Assets at close of reporting period						BLOCK B	Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.	BLOCK C				Date (Mo., Day, Yr.) Only if Honoraria				
		\$1,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$500,000	\$500,001 - \$1,000,000*	\$1,000,001 - \$5,000,000	Over \$5,000,000	Type	None (or less than \$201)	\$1,001 - \$2,500	\$2,501 - \$5,000	\$5,001 - \$15,000	\$15,001 - \$100,000	Over \$100,000*	Over \$500,000	Other Income (Specify Type & Actual Amount)	
1	Comerica Inc	X																
2	Flinsar Corp	X																
3	Fulton Financial Corp	X																
4	Hein Celestial Group Inc	X																
5	Hartford Financial Services	X																
6	Hub Group Inc	X																
7	Integra LifeSciences Hldgs	X																
8	Kansas City Southern Inds	X																
9	Laboratory Corp Amer Hldgs	X																

\* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.

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Reporting Individual's Name		SCHEDULE A continued (Use only if needed)										Page Number		
Verrill, Donald B., Jr.												20 of 25		
BLOCK A Assets and Income	BLOCK B Valuation of Assets at close of reporting period						BLOCK C Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.						Other Income Specify Type & Actual Amount	Date (Mo., Day, Yr.) Only if Honorary
	\$1,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$500,000	\$500,001 - \$1,000,000*	Over \$1,000,000*	None (or less than \$201)	\$1,001 - \$2,500	\$2,501 - \$5,000	\$5,001 - \$15,000	\$15,001 - \$50,000	Over \$50,000		
1. Legg Mason Inc														
2. Lincoln National Corp														
3. Marshall & Hays Corp														
4. Millicom Int Cellular														
5. NII Hlgs Inc														
6. NTELOS Hlgs Corp														
7. Old Dominion Flight Lines Inc														
8. Owens Illinois Inc														
9. On Semiconductor Corp														

\* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.

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Reporting Individual's Name		SCHEDULE A continued (Use only if needed)										Page Number								
Verrill, Donald B., Jr.												21 of 26								
Assets and Income  BLOCK A	Valuation of Assets at close of reporting period							Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.												
	BLOCK B							BLOCK C												
	\$1,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$250,000	Over \$1,000,000*	\$5,000,001 - \$25,000,000	Over \$50,000,000	None	Dividends	Interest	Rent	None (or less than \$201)	\$1,001 - \$2,500	\$2,501 - \$5,000	\$5,001 - \$15,000	\$15,001 - \$50,000	Over \$1,000,000*	Over \$5,000,000	Other Income (Specify Type & Annual Amount)	Date (Mo., Day, Yr.) Only if Honorary
1 OSI Pharmaceuticals Inc	X																			
2 Phase Forward Inc	X																			
3 PWC Sierra Inc	X																			
4 Pinnacle ENTMT Inc	X																			
5 Pharmaceutical Product Dev Inc	X																			
6 PACTIV Corp	X																			
7 SBA Communications Corp	X																			
8 Smith Intl Inc	X																			
9 SunTrust Banks Inc	X																			

\* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.



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Reporting Individual's Name		SCHEDULE A continued (Use only if needed)										Page Number				
Verrill, Donald B., Jr.												23 of 26				
BLOCK A	BLOCK B Valuation of Assets at close of reporting period										BLOCK C Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.		Date (Mo., Day, Yr.) Only if Honorary			
	Type	None (or less than \$201)	\$1,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$250,000	\$250,001 - \$500,000	\$500,001 - \$1,000,000	\$1,000,001 - \$2,500,000	\$2,500,001 - \$5,000,000	Over \$5,000,000	Type		Amount	Other Income (Specify Type & Actual Amount)	
1	(RSB) Thrift Account Mutual of America (Spouse); Inst. of Amer Money Market Fund	X										X	None (or less than \$201)			
2	Mut of America Interest Bearing Cash Account	X										X	None (or less than \$201)			
3	Calvert VP SRI Balanced Portfolio Fund	X										X	None (or less than \$201)			
4																
5																
6																
7																
8																
9																

\* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher category of value, as appropriate.

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Do not complete Schedule B if you are a new entrant, nominee, or Vice Presidential or Presidential Candidate

Reporting Individual's Name: **SCHEDULE B** Page Number: **24 of 26**  
 Verrill, Donald B., Jr.

**Part I: Transactions**

Report any purchase, sale, or exchange by you, your spouse, or dependent children during the reporting period of any real property, stocks, bonds, commodity futures, and other securities when the amount of the transaction exceeded \$1,000. Include transactions that resulted in a loss.

Do not report a transaction involving property used solely as your personal residence, or a transaction solely between you, your spouse, or dependent child. Check the "Certificate of divestiture" block to indicate sales made pursuant to a certificate of divestiture from OGE.

None

Date (Mo., Day, Yr.)	Transaction Type (s)	Amount of Transaction (s)						Certificate of Divestiture
		\$1,000 - \$9,999	\$10,000 - \$49,999	\$50,000 - \$99,999	\$100,000 - \$499,999	\$500,000 - \$999,999	\$1,000,000 or more	
2/1/99	Central Airlines Common							

\*This category applies only if the underlying asset is solely that of the filer's spouse or dependent children. If the underlying asset is either held by the filer or jointly held by the filer with the spouse or dependent children, use the other higher categories of value, as appropriate.

**Part II: Gifts, Reimbursements, and Travel Expenses**

For you, your spouse and dependent children, report the source, a brief description, and the value of: (1) gifts (such as tangible items, transportation, lodging, food, or entertainment) received from one source totaling more than \$260, and (2) travel-related cash reimbursements received from one source totaling more than \$260. For conflicts analysis, it is helpful to indicate a basis for receipt, such as personal friend, agency approval under 5 U.S.C. § 4111 or other statutory authority, etc. For travel-related gifts and reimbursements, include travel itinerary, dates, and the nature of expenses provided. Exclude anything given to you by the U.S. Government; given to your agency in connection with official travel; received from relatives; received by your spouse or dependent child totally independent of their relationship to you; or provided as personal hospitality at the donor's residence. Also, for purposes of aggregating gifts to determine the total value from one source, exclude items worth \$104 or less. See instructions for other exclusions.

None

Source (Name and Address)	Brief Description	Value
Examples: Walt Team, of Rock College, NY, NY	Airline ticket, hotel room & meals incident to national conference 8/15/99 (personal activity unrelated to duty)	\$500
Frank Jones, San Francisco, CA	Leather briefcase (personal friend)	\$100

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**SCHEDULE C**

**Part I: Liabilities** None

Report liabilities over \$10,000 owed to any one creditor at any time during the reporting period by you, your spouse, or dependent children. Check the highest amount owed during the reporting period. Exclude a mortgage on your personal residence unless it is rented out; loans secured by automobiles, household furniture or appliances; and liabilities owed to certain relatives listed in instructions. See instructions for revolving charge accounts.

Creditor (Name and Address)	Type of Liability	Date Incurred	Interest Rate	Term if applicable	Category of Amount or Value (a)											
					\$1,000	\$1,000-\$10,000	\$10,000-\$25,000	\$25,000-\$50,000	\$50,000-\$100,000	\$100,000-\$250,000	\$250,000-\$500,000	\$500,000+				
<i>Examples</i> First District Bank, Washington, DC	Mortgage on rental property, Delaware	1991	8%	25 yrs.												
Jada Jones, 123 1st St., Washington, DC	Promissory note	1999	10%	on demand												
1 Bank of America Visa	Credit Card	2007	12%	revolving		X										
2																
3																
4																
5																

\* This category applies only if the liability is solely that of the filer's spouse or dependent children. If the liability is that of the filer or a joint liability of the filer with the spouse or dependent children, mark the other higher categories, as appropriate.

**Part II: Agreements or Arrangements** None

Report your agreements or arrangements for: (1) continuing participation in an employee benefit plan (e.g. pension, 401k, deferred compensation); (2) continuation of payment by a former employer (including severance payments); (3) leaves of absence; and (4) future employment. See instructions regarding the reporting of negotiations for any of these arrangements or benefits.

Status and Terms of any Agreement or Arrangement	Parties	Date
<i>Example</i> Pursuant to partnership agreement, will receive lump sum payment of capital account & partnership share calculated on service performed through 1/1/00	Doe Jones & Smith, Hometown, State	7/83
1 I still maintain a portion of my retirement income (as listed in Schedule A above) in the Jenner & Block 401(k) plan. No further contributions will be made to the 401(k) by myself or the firm.	Jenner & Block, Washington, D.C.	01/91
2		
3		
4		
5		
6		

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Reporting Individual's Name Vonnell, Donald B., Jr.	<b>SCHEDULE D</b>	Page Number 26 of 26
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**Part I: Positions Held Outside U.S. Government**  
 Report any positions held during the applicable reporting period, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature. None

	Organization (Name and Address)	Type of Organization	Position Held	From (Mo., Yr.)	To (Mo., Yr.)
Examples	NIAC Ann. of Rock Creek, WI, WI	Non-profit education	President	6/92	Present
	Doe Jones & Smith, Hometown, State	Law firm	Partner	7/85	1/00
1	Jenner & Block, Washington, DC	Law Firm	Partner	01/1991	2/2009
2					
3					
4					
5					
6					

**Part II: Compensation in Excess of \$5,000 Paid by One Source**  
 Report sources of more than \$5,000 compensation received by you or your business affiliation for services provided directly by you during any one year of the reporting period. This includes the names of clients and customers of any corporation, firm, partnership, or other business enterprise, or any other non-profit organization when you directly provided the services generating a fee or payment of more than \$5,000. You need not report the U.S. Government as a source. Do not complete this part if you are an Incumbent, Termination Filter, or Vice Presidential or Presidential Candidate. None

	Source (Name and Address)	Brief Description of Duties
Examples	Doe Jones & Smith, Hometown, State	Legal services
	Metro University (client of Doe Jones & Smith), Hometown, State	Legal services in connection with university construction
1	Jenner & Block, Washington, D.C.	Law Partnership (January 2002)
2	Viacom	Provided legal services as Jenner & Block partner, January 2009
3	Sorenson Communications	Provided legal services as Jenner & Block partner, January 2009
4		
5		
6		

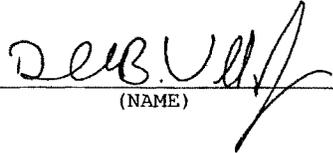
Please Refuse Cannot Be Used.

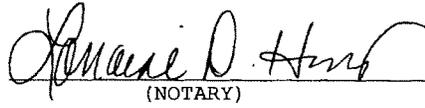
OGES/Abuse Annual Review 7.0.2 (11/6/2009)

AFFIDAVIT

I, DONALD B. VERRILLI, JR., do swear  
that the information provided in this statement is, to the best  
of my knowledge, true and accurate.

02/02/2011  
(DATE)

  
(NAME)

  
(NOTARY)

Lorraine D. Hunt  
Notary Public, District of Columbia  
My Commission Expires 2/28/2011

Senator WHITEHOUSE. Thank you very much, Mr. Verrilli.  
Ms. Seitz, you have the opportunity as Mr. Verrilli to introduce family and make a statement. Please proceed.

**STATEMENT OF VIRGINIA A. SEITZ, NOMINEE TO BE ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE**

Ms. SEITZ. Thank you, and I would like to thank Senators Carper—

Senator WHITEHOUSE. Is your microphone on?

Ms. SEITZ. I would like to thank Senators Carper and Coons also for their kind introductions. I am grateful to the President for the honor of the nomination and to this Committee for its consideration.

I would like to thank my family: my husband, Roy, who is a 25-year veteran of the Department of Justice. We met while he was clerking for Justice Scalia and I was clerking for Justice Brennan. He is the best imaginable husband and father. My son, Roy, who is a sophomore at Field School. He is representing his sister, who is a sophomore at the University of Chicago. And my brother, C.J., who is representing my other brothers, Mark and Steven. And my niece, Meredith, who is representing too many nieces and nephews to count. And my absent parents, whom I wish very much could be here today.

As has been mentioned, my father was the judge who ordered the immediate desegregation of public schools in Delaware. At the time his decisions were extraordinary and courageous. He believed, though, that the law required that result, and he was very passionate about the rule of law.

If I am confirmed, I will do my best to follow in his footsteps, and I can make no deeper commitment.

Thank you to the Committee.

[The biographical information of Ms. Seitz follows.]

UNITED STATES SENATE  
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR NON-JUDICIAL NOMINEES

PUBLIC

1. **Name**: State full name (include any former names used).

Virginia Anne Seitz  
Muffy Seitz (nickname)

2. **Position**: State the position for which you have been nominated.

Assistant Attorney General, Office of Legal Counsel

3. **Address**: List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

Sidley Austin, LLP, 1501 K St. NW, Washington, DC 20005

4. **Birthplace**: State date and place of birth.

1956, Wilmington, DE

5. **Education**: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

Buffalo Law School, 1981-1985, J.D. May 1985.  
Oxford University, 1978-1980, P.P.E., June 1980.  
Duke University, 1974-1978, B.A., May 1978.

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or description.

1998-present  
Partner  
Sidley Austin, LLP, 1501 K St. NW, Washington, DC 20005

1987-1997  
Partner, 1993-1997; Associate, 1987-1992

Bredhoff & Kaiser, 805 15<sup>th</sup> St. NW, Washington, DC 20005

1995-2000

Member, Board of Directors

Office of Compliance, LA 200, John Adams Bldg., 110 Second St. SE, Washington, DC 20540

1986-1987

Law clerk to Justice William J. Brennan, Jr.

U.S. Supreme Court, One First St. NW, Washington, DC 20543

1985-1986

Law clerk to Judge Harry T. Edwards

U.S. Court of Appeals for the D.C. Circuit, 333 Constitution Avenue NW, Washington, DC 20001

Summer 1984, January-June 1985

Law clerk

Migrant Legal Action Program, 1001 Connecticut Ave. NW, Washington, DC 20036

October 1983-April 1984 (estimated)

Law clerk

Allen, Lippes and Shonn, PC, 1260 Delaware Ave., Buffalo, NY 14209

March 1983-December 1983 (estimated)

Research assistant

Professors Alfred Konefsky & James Atleson, O'Brian Hall – Law School, Buffalo, NY 14260

September 1983-December 1983 (estimated)

Law clerk for single project

Magavern, Magavern (firm no longer exists), Buffalo, NY

Academic Year 1982-1983, Fall 1983

Research & Writing Instructor

Buffalo Law School, O'Brian Hall – Law School, Buffalo, NY 14260

Summer 1982

Law clerk

Saperstein, Day (firm no longer exists), Buffalo, NY

Academic Year 1980-1981

History teacher and field hockey coach

The Park School, 4625 Harlem Road, Buffalo, NY 14226

7. **Military Service and Draft Status:** Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

No. I was not required to register for selective service.

8. **Honors and Awards:** List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

1974 National Merit Scholar

1977-78 Duke University: Phi Beta Kappa, summa cum laude, distinction in history.

1978-1980 Oxford University: Rhodes Scholarship; Brasenose Exhibition (award for scholarship)

1985 Buffalo Law School: First in Class, Max Koren award for outstanding student

2002 Lawyer's Committee for Civil Rights, Outstanding Achievement Award, Public Accommodations

2006 Edward Coke Inns of Court, elected as master

2006-2010 Sidley Austin Pro Bono Award

2007 National Association of Attorneys General, Volunteer Recognition Award

2009 Project for Attorney Retention "Flex Success" Award

9. **Bar Associations:** List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

1987-present, District of Columbia Bar

Mid-1990's-present (approximate), American Bar Association, Member

2005-2008, American Bar Association, Litigation Section, co-chair amicus subcommittee

2005-September 10, 2010, National Association of Women Lawyers, Committee for the Evaluation of Supreme Court nominees

May 2005-2007, 2010-2011, Women's Bar Association of the District of Columbia

2000-2006, DC Circuit Advisory Committee on Procedures

10. **Bar and Court Admission:**

- a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

1987-present, District of Columbia. There have been no lapses in my membership.

1985-2009, Pennsylvania. Once I became a member of the DC Bar, I took inactive status from 1987-2009. I ceased to be a member in 2009 when Pennsylvania first imposed a charge for inactive status.

- b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

U.S. Supreme Court, 1993-present  
 U.S. Court of Appeals, First Circuit, 2006-present  
 U.S. Court of Appeals, Second Circuit, 1999, 2010 (My membership expired in approximately 2004 (court does not retain precise date) when I did not renew my membership because I did not then have any appeal pending in that court; I renewed my membership in 2010 to argue an appeal by making the required payment.)  
 U.S. Court of Appeals, Third Circuit, 1985-present  
 U.S. Court of Appeals, Fourth Circuit, 1988-present  
 U.S. Court of Appeals, Sixth Circuit, 1989-present  
 U.S. Court of Appeals, Seventh Circuit, 1996-present  
 U.S. Court of Appeals, Eighth Circuit, 2006-present  
 U.S. Court of Appeals, Ninth Circuit, 1992-present  
 U.S. Court of Appeals, Tenth Circuit, 2009-present  
 U.S. Court of Appeals, Eleventh Circuit, 1989-1994, 2006-present (My membership expired in approximately 1994 (court does not retain precise date) when I did not renew my membership because I did not then have any appeal pending in that court; I renewed my membership in 2006 to argue an appeal by making the required payment.)  
 U.S. Court of Appeals, DC Circuit, 1995-present  
 U.S. Court of Appeals, Federal Circuit, 2003-present  
 U.S. District Court, DC, 1993-present  
 DC Court of Appeals, 1987-present  
 Pennsylvania, 1985-87, 1987-2009 (inactive status), 2009 (I ceased to be a member in 2009 due to imposition of a fee for inactive status.)

11. **Memberships:**

- a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

American Association of Rhodes Scholars (not sure of years of membership)  
 American Constitution Society for Law and Policy, 2004-present  
 Bannockburn Swim Club (three years of membership during the 1990's, unsure of dates)  
 Buffalo Law School Alumni Association (not sure of years of membership)

Edward Coke Inns of Court, 2006-present  
 Field School parents' association, 2002-present. Class representative during  
 several years, including 2010-11  
 Lafayette Home and School Association, 1995-2000  
 Sport & Health Club, 2009-10

I have made financial contributions to charitable organizations over the years. I have not included in the list above any organizations to which I gave funds and did not otherwise participate in programmatic activities although the organization may label me a member. Although there may be others I have not found in my records, these organizations include: AARP and WETA.

- b. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

They did not and do not, to my knowledge.

12. **Published Writings and Public Statements:**

- a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

I have done my best to identify all books, articles, reports, letters to editors, editorials and other published material, including through a review of my personal files and searches of publicly available electronic databases. Despite my searches, there may be other items I have been unable to identify, find or remember. I have located the following:

The Value of Values and Assumptions to a Practicing Lawyer, 57 Buffalo L. Rev. 687 (2009). Copy supplied.

Posting on PrawfsBlawg about Judge Edwards' new book, Sept. 8, 2007. Copy supplied.

Feature: Chancellor Seitz's Perspective on Brown v. Bd. of Education, 22 Del. Law. 11 (Spring 2004). Copy supplied.

Virginia Seitz & Joseph Guerra, A Constitutional Defense of Entrenched Senate Rules Governing Debate, 20 Journal of Law and Politics 1 (Winter 2004). Copy supplied.

Congress and the Court, 23 Cumberland Law Review 97 (1992-93). Copy supplied.

Entry in the American Oxonian, Volume 79 (1992). I do not have a copy and do not recall the topic.

Tribute to Justice Brennan, Judicature Magazine, vol. 14 (1991). Copy supplied.

Virginia Seitz & Harry Edwards, From Labor Law to Employment Law – What Next? In Industrial Relations at the Dawn of the New Millennium (1988). Copy supplied.

Legal, Legislative and Managerial Responses to the Organization of Supervisory Employees in the 1940's, American Journal of American History (Oct. 1984). Copy supplied.

- b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

The list below consists of materials I have identified from my recollection and from a search of internet databases. Despite my searches, there may be other items I have been unable to identify, find or remember.

June 23, 2010, National Association of Women Lawyers Evaluation of Solicitor General Elena Kagan. Copy supplied.

July 7, 2009, National Association of Women Lawyers Evaluation of Judge Sonia Sotomayor. Copy supplied.

Sept. 20, 2005, National Association of Women Lawyers Evaluation of Judge John Roberts, Jr. Copy supplied.

Office of Compliance, Section 102(b) Report, 1998. Copy supplied.

Office of Compliance, Section 102(b) Report, 1996. Copy supplied.

Office of Compliance, Section 301(h) Report to Congress, 1999. Copy supplied.

Office of Compliance, Section 301(h) Report to Congress, 1998. Copy supplied.

Office of Compliance, Section 301(h) Report to Congress, 1997. Copy supplied.

Office of Compliance, Section 301(h) Report to Congress, 1996. Copy supplied.

Office of Compliance, Section 230 Study, 1996. Copy supplied.

Office of Compliance, Three Year Report, May 1999. Copy supplied.

While I was a member of the Board of Directors of the Office of Compliance, the Board adjudicated disputes. I have supplied a list of all decisions that were issued while I was a Board member.

In addition, while I was a member of the Board of Directors of the Office of Compliance, the Board issued notices of proposed rulemaking and rules. Supplied is a list of those NPRMs and rules.

- c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

The list below consists of material identified based on my recollection and searches of internet databases. Despite my searches, there may be other items I have been unable to identify, find or remember.

February 2, 1999: I testified before the U.S. House Appropriations Subcommittee on Legislative Branch regarding legislative appropriations for Office of Compliance for Fiscal Year 2000. Copy supplied.

February 11, 1997: I testified before the U.S. House Appropriations Subcommittee on Legislative Branch regarding legislative appropriations for Office of Compliance for Fiscal Year 1998. Copy supplied.

See also response to subpart b, above.

- d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

The list below consists of material identified based on my recollection and searches of internet databases. Despite my searches, there may be other items I have been unable to identify, find or remember.

July 1, 2010: Panel discussion on Supreme Court Term, sponsored by the American Constitution Society for Law and Policy, Washington, DC. A video recording of this event is available at <http://www.acslaw.org/node/16470>.

April 8, 2010: Panel discussion on Women in the Supreme Court Bar, Washington, DC. A video of this panel is available at <http://www.youtube.com/watch?v=tife4XiKDg4>.

October 25, 2009: Tower Hill Lecture to high school students at Tower Hill School in Wilmington, DE. Remarks supplied.

April 14, 2009: Panel discussion on Ricci v. DeStefano sponsored by the American Constitution Society for Law and Policy. Materials supplied and video recording available at <http://dl2.newmediamill.net/media/acs/flash/140409/mediaplayer.html>.

Winter 2008-2009 (approximately): panel member for Effective Appellate Advocacy, sponsored by the Pennsylvania Bar Institute, 100 Penn Square East, 10<sup>th</sup> Floor, Philadelphia, PA 19107. I have no notes, transcript or recording.

November 2008: Speaker during lunch for Delaware State Bar Association members newly sworn into the Supreme Court Bar, remarks on practicing before the Supreme Court. I have no notes, transcript or recording.

September 19, 2008: Panelist during Symposium on James Atleson's Values and Assumptions in American Labor Law, a 25<sup>th</sup> Anniversary Retrospective, Buffalo, New York. I prepared the paper entitled, "The Value of Values and Assumptions to a Practicing Lawyer" for the event. A copy of the paper was supplied in response to 12(a).

October 2, 2008: Panel member for Preview of the Supreme Court Term, sponsored by the Federalist Society, Washington, DC. A video recording is available at [http://www.fed-soc.org/publications/pubID.1161/pub\\_detail.asp](http://www.fed-soc.org/publications/pubID.1161/pub_detail.asp).

April 2008: Presentation to Third Circuit Judicial Conference on Effective Appellate Advocacy, Cambridge, MD. Remarks supplied.

March 17, 2008, Panel member in CLE Counseling Clients in the Entertainment Industry, Practicing Law Institute, New York, NY. I have no notes, transcript or recording. The address of the Institute is 810 Seventh Avenue, 21<sup>st</sup> Floor, New York, New York 10019.

September 26, 2007: Panel member for Supreme Court Term Preview, sponsored by the American Constitution Society for Law and Policy, Washington, DC. I do not have a text, but a video recording is available at <http://acslaw.org/node/5457> [scroll down and select a media format for viewing].

October 2006 or 2007: DC Bar CLE on Appellate Brief Writing, Washington, DC. I have no notes, transcript or recording. The address of the Bar Association is 1101 K Street NW, Suite 200, Washington, DC 20005.

June or July 2006: Introduction of Judge Harry T. Edwards, lecture on the occasion of the 50<sup>th</sup> anniversary of Brown v. Board of Education, Washington, DC. Remarks supplied.

November 4, 2005: Speech and Presentation of Portrait of Judge Harry T. Edwards, Washington, DC. Remarks supplied.

April 13, 2004: Speech to Joint Session of the Delaware Inns of Court, honoring Judge Collins J. Seitz, Wilmington, DE. Remarks supplied.

2004 (approximately): Minority Corporate Counsel Association, Member of a Panel on Consequences of Grutter and Gratz, Chicago, IL. I have no notes, transcript or recording. The address of MCCA is 1111 Pennsylvania Avenue NW, Washington, DC 20004.

June 18, 2003: Panel discussion about Supreme Court decisions in Grutter v. Bollinger and Gratz v. Bollinger, sponsored by a project of the Leadership Conference on Civil Rights called Fair Chance, Washington, DC. I have been unable to obtain a transcript or recording, but press coverage of the event is supplied.

March 31, 2003: Panelist at Federalist Society, discussion on Grutter and Gratz cases before the Supreme Court, Washington, DC. Notes of remarks supplied.

January 29, 1999: Speech about Judge Collins J. Seitz, at Memorial Sitting of Courts in his honor, Wilmington, DE. Transcript supplied.

October 1998: Eulogy for Judge Collins J. Seitz, Wilmington, DE. I cannot locate my notes.

1998: Speaker, Women and Sports Conference, sponsored by the Susan B. Anthony University Center, now The Anthony Center for Women's Leadership, University of Rochester, Rochester, NY. Press coverage supplied.

July 29, 1997: Speaker during Justice Brennan's funeral and vigil. Press coverage and notes of remarks supplied.

June 17, 1994: Speaker during dedication of the Third Circuit court room to Judge Collins Seitz. A video recording of the event is available at <http://www.c-spanvideo.org/program/RoomD>.

1992: Panelist during Sixth Annual Federalist Society Lawyers Convention Symposium, *Panel III: Congress, the Court, and the Bill of Rights*. Transcript published in 23 Cumberland Law Review 97 (1992-1993).

Late October or early November 1991: Remarks while accepting award to Justice William J. Brennan, Jr. from National Association of Women Judges. Remarks supplied.

September 10, 1990; Remarks about Justice William J. Brennan Jr., at Judicial Conference of the Third Circuit, Wilmington, DE. The approximate text of these remarks is published in the *Judicature* article provided in response to 12(a).

National Association of Attorneys General, Supreme Court Advocacy Seminar Panel on Merits Briefs on the dates listed below. I do not have notes of my comments at these panel sessions. NAAG's address is 2030 M St. NW, 8<sup>th</sup> Floor, Washington, DC 20036.

December 3, 2009  
 December 4, 2008  
 November 29, 2007  
 December 6, 2006  
 December 8, 2005  
 December 12, 2002  
 November 29, 2001.

I have given numerous talks and participated in many panels internally at Sidley Austin and in connection with the promotion of Sidley Austin's appellate practice. I do not recall the dates of these events. Generally, they involved how to be a successful associate; how to write effectively; how to draft particular types of pleadings; or were training for oral argument; training for women associates; discussions of part-time working arrangements; discussions of the past or coming Supreme Court terms; or discussions of particular cases I have handled. I have supplied notes that I have from some but not all of these talks.

- e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

The list below consists of material identified based on my recollection and searches of internet databases. Despite my searches, there may be other items I have been unable to identify, find or remember.

Maureen Milford, *Lawyer, a Former Delawarean, Impressed by Sotomayor*, News Journal, June 4, 2009, at 1A. Copy supplied.

Rebecca Gorlov, *The Dreaming Spires: Rhodes Scholars at Oxford*, Rhodes Project, 2009. Copy supplied.

*Will Court Remain Business-Friendly*, NPR, Oct. 1, 2007. Transcript supplied.

Debra Bruno, *How One Part-Timer Leads a Very Full Life*, Legal Times, July 9, 2007, at 20. Copy supplied.

Marcia Coyle, *High Court Raises Hurdle on Fees*, National Law Journal, June 11, 2007, at 7. Copy supplied.

Allen Pusey, *Bare-Bones Ruling in Nudists' Suit*, ABA Journal E-Report, June 8, 2007, at 1. Copy supplied.

Lily Henning, *The Edwards Treatment*, Legal Times, Nov. 21, 2005, at 1. Copy supplied.

Steve Inskeep, *Supreme Court Agrees to Review the Arthur Andersen Case*, NPR Morning Edition, Apr. 27, 2005. Transcript supplied.

Amelia Gruber, *Affirmative Action Rulings Unlikely to Impact Military Academies' Policies*, GOVEXEC.com, July 3, 2003. Copy supplied.

Jonathan Groner, *How University Got Support of Military Leaders*, Legal Times, June 30, 2003, at 1. Copy supplied.

Lyle Denniston, *Military May Sway Court on Diversity*, Boston Globe, June 22, 2003, at A1. Copy supplied.

Josh Getlin, *The Nation: Case Sparks Recruitment Debate Over Race*, Los Angeles Times, June 22, 2003, at 38. Copy supplied.

Andrea N. Boyle, *Entergy Louisiana, Inc. v. Louisiana Public Service Commission, et al.*, Medill News Service via On the Docket, 2003. Copy supplied.

Carter G. Phillips, *Runner-Up*, National Law Journal, Dec. 25, 2000-Jan. 1, 2001, at A8. Copy supplied.

Christopher E. Bush, *Litigator Helps Hold Members of Congress in Compliance*, Corporate Legal Times, May 1998, at 36. Copy supplied.

Elizabeth Kastor, *Happiness is a Warm Pupa*, Washington Post, at B1. Copy supplied.

Timothy Burns, *Judge Delays Ruling in Shutdown Lawsuit*, United Press International, Nov. 16, 1995. Copy supplied.

Erik Gunn, *Retirees Lose Appeal Over Benefits*, Milwaukee Journal, June 22, 1993, at C6. Copy supplied.

*Former Clerks Recall an Ageless Justice*, National Law Journal, Aug. 13, 1990, at S5. Copy supplied.

13. **Public Office, Political Activities and Affiliations:**

- a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

May 24, 1995-May 24, 2000: Member, Board of Directors of Office of Compliance, appointed by House and Senate Majority and Minority Leaders (Sen. Dole, Sen. Daschle, Rep. Gingrich, Rep. Gephardt).

- b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I volunteered my time in connection with President Obama's transition in the administrative agency review project, specifically cataloguing the status of legal matters involving administrative agencies. I did not have a title. I am unsure of the precise time frame, but believe it was at the end of 2008 and the beginning of 2009.

14. **Legal Career:** Answer each part separately.

- a. Describe chronologically your law practice and legal experience after graduation from law school including:

- i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

Law clerk, Honorable Harry T. Edwards of the United States Circuit Court for the District of Columbia, 1985 through 1986.

Law clerk, Justice William J. Brennan, Jr. of the Supreme Court of the United States, 1986 through 1987.

- ii. whether you practiced alone, and if so, the addresses and dates;

For approximately four months in late 2002, I resigned my partnership to handle a matter on which a conflict of interest between my client and Sidley arose. Once that matter was concluded, I was invited to rejoin the partnership and I did so as of January 1, 2003.

- iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

Prior to my graduation from law school, I served as a law clerk in a number of offices and as a research and writing instructor and research assistant at my law school. In the summer of 1982, I served as a law clerk at the Saperstein, Day firm in Buffalo, NY. That firm no longer exists. During the 1982-1983 academic year and again in the fall of the 1983-1984 academic year, I worked as a research and writing instructor at Buffalo Law School, O'Brian Hall – Law School, Buffalo, NY 14260. In addition, from September 1983-December 1983 (estimated), I worked as a law clerk on a single project for the firm Magavern, Magavern in Buffalo, NY. That firm no longer exists. From March 1983-December 1983 (estimated), I worked as a research assistant for Professors Alfred Konefsky and James Atleson, O'Brian Hall – Law School, Buffalo, NY 14260. From October 1983-April 1984 (estimated), I worked as a law clerk at Allen, Lippes and Shonn, PC, 1260 Delaware Ave., Buffalo, NY 14209. Finally, during the summer of 1984 and from January-June 1985, I worked as a law clerk at the Migrant Legal Action Program, 1001 Connecticut Ave. NW, Washington, DC 20036. Thereafter, I started my first judicial clerkship.

I followed those clerkships by joining Bredhoff & Kaiser (now 805 15<sup>th</sup> St. NW, Washington, DC 20005) as an associate in 1987. I practiced there until 1997, having been promoted to the partnership during the mid-1990s.

In May 1995, I was appointed to the Board of Directors of the Office of Compliance (Rm. LA 200, John Adams Building, 110 Second St. SE, Washington, DC 20540) for a five-year term.

In January of 1998, I joined Sidley & Austin (now Sidley Austin LLP, 1501 K St. NW, Washington, DC 20005) as a partner, and I have been practicing as a Sidley partner from that date to the present (other than the short period described above in ii).

- iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have never served as a mediator or arbitrator.

## b. Describe:

- i. the general character of your law practice and indicate by date when its character has changed over the years.

After my clerkships, I began my career in private practice at the law firm of Bredhoff & Kaiser. My practice there involved litigation in district courts, the courts of appeals and the Supreme Court, and the counseling of clients. In 1995, after my appointment to the Board of the Office of Compliance (where I was a part-time special government employee), I was also engaged in the drafting of regulations and the adjudication of disputes under the Congressional Accountability Act. In 1998, I joined Sidley Austin LLP. My practice there involves federal court litigation, primarily appellate litigation in the federal courts of appeals and in the Supreme Court. I also do substantial counseling.

- ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

My practice at Bredhoff & Kaiser involved the representation of labor unions, multiemployer health and retirement funds, and individuals. It principally involved litigation under the federal labor and employment laws and the Constitution. At the Office of Compliance, I was a member of the Board of Directors, and thus the Office was my "client." In that role, I was also focused on federal labor and employment laws. After I moved to Sidley Austin LLP in 1998, my practice continued to involve the representation of a labor union (the Major League Baseball Players Association), but it also became a generalist appellate practice where I primarily represent corporations, nonprofit associations, and states or governmental entities. My pro bono work at Sidley has focused on civil rights issues and the representation of associations and non-profits.

- c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

- i. Indicate the percentage of your practice in:
- |                            |     |
|----------------------------|-----|
| 1. federal courts;         | 85% |
| 2. state courts of record; | 4%  |
| 3. other courts;           | 0%  |
| 4. administrative agencies | 1%  |

The remaining 10% of my practice has involved the counseling of clients. My practice has been almost exclusively focused on litigation, and primarily on litigation in the federal courts, though I have handled appeals in the appellate courts in Virginia, Ohio, Maryland and

Delaware. I have occasionally participated in a matter before a federal agency, but that is relatively rare; I have been involved in a number of petitions for review of decisions of federal agencies. I have argued a number of appellate cases, including one in the Supreme Court, and cases in the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Eleventh, and DC Circuits, as well as in the state courts mentioned above. In addition, I have argued motions in federal district courts. There is no real pattern to the distribution of my oral arguments. By way of example, however, in 2010, I argued in the Supreme Court of Delaware, before the Special Master in a case before the U.S. Supreme Court, and in the Court of Appeals for the Second Circuit.

Some percentage of my practice also involves advising clients on legal issues of federal law.

ii. Indicate the percentage of your practice in:

- |                          |     |
|--------------------------|-----|
| 1. civil proceedings;    | 98% |
| 2. criminal proceedings. | 2%  |

I have assisted with the briefing of at least two petitions for certiorari that involved criminal issues as well as various other appeals related to criminal proceedings, but virtually all of my practice has involved civil proceedings.

d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

i. What percentage of these trials were:

1. jury;
2. non-jury.

I have not tried a case to verdict before a jury or judge, though I have participated in arbitrations and in district court litigation that was resolved on dispositive motions. Examples of my participation in district court proceedings are (i) my argument on behalf of CSX Transportation, Inc. in support of its motion for summary judgment on the question whether a statute forbidding the transportation of certain hazardous materials through the District of Columbia was preempted by federal law in *CSXT v. Williams et al.*, No. 05-00338 (D.D.C.), and (ii) my argument in support for bifurcation of proceedings on behalf of intervenor Duke Energy Carolinas, Inc. in *South Carolina v. North Carolina*, Orig. No. 138 (Special Master, U.S. Sup. Ct.).

- e. Describe your practice, if any, before the Supreme Court of the United States. Supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

I have argued one case before the Supreme Court and been the counsel of record in another Supreme Court case that was summarily decided on the merits. In addition, I have written numerous briefs of every genre filed in the Supreme Court.

I have done my best to identify all briefs filed in the Supreme Court on which my name appears, including a thorough review of my personal files and searches of publicly available electronic databases and have located the briefs listed below. Despite my searches, there may be other items I have been unable to identify, find or remember.

**Beer v. United States, No. 09-1395**

Amicus brief on behalf of Bar Associations (petition stage)

**Markell v. The Office of the Commissioner of Baseball, No. 09-914**

Petition for certiorari  
Reply brief in support of petition for certiorari

**Samantar v. Yousuf, No. 08-1555**

Amicus brief on behalf of Retired Military Professionals (merits stage)

**Berghuis v. Smith, No. 08-1402**

Amicus brief on behalf of NAACP Legal Defense and Education Fund (merits stage)

**Chase Bank v. McCoy, No. 09-0329**

Amicus brief on behalf of American Bankers Ass'n and Consumer Bankers Ass'n (petition stage)

**State of Alabama v. State of North Carolina, No. 132**

Brief in Support of Exceptions  
Reply brief in support of exceptions  
Brief in surreply to respondents' reply brief  
Reply in support of motion for leave to file bill of complaint

**Benally v. U.S., No. 09-5429**

Amicus on behalf of National Congress of American Indians (petition stage)

**Hawaii v. Office of Hawaiian Affairs, No. 07-1372**

Amicus brief on behalf of Current and Former Hawaii State Officials (merits stage)

**U.S. v. Navajo Nation, No. 07-1410**

Brief in opposition  
Brief for respondent

**AT&T v. Hulteen, No. 07-543**

Brief for petitioner  
Reply brief for petitioner

**Major League Baseball Advanced Media v. C.B.C. Distrib. and Marketing, No. 07-1099**

Petition for certiorari  
Reply brief in support of petition

**Engquist v. Oregon Dep't of Agriculture, No. 07-474**

Brief for petitioner  
Reply brief for petitioner

**Plains Commerce Bank v. Long Family Land and Cattle Co., No. 07-411**

Amicus brief on behalf of Brief of National Congress of American Indians et al. in support of respondents (merits stage)

**Greenlaw v. U.S., No. 07-330**

Brief of court appointed amicus in support of judgment below

**Gomez-Perez v. Potter, No. 06-1321**

Brief for petitioner  
Reply brief for petitioner

**Exxon Shipping v. Baker, No. 07-219**

Amicus brief on behalf of Chamber of Commerce of U.S. in support of petitioner (petition stage)  
Amicus brief on behalf of Chamber of Commerce of U.S. in support of petitioner (merits stage)

**State of South Carolina v. State of North Carolina, No. 138, Original**

Duke Energy's motion to intervene  
Duke Energy's reply brief in support of motion to intervene  
Duke's Reply to SC's exceptions to First Interim Report

**Quanta Computer v. LG Electronics, No. 06-937**

Brief of respondent

**Hall Street Associates v. Mattel, Inc., No. 06-989**

Reply brief of petitioner  
Supplemental brief  
Supplemental reply brief

**Dickinson v. Collier, No. 07-197**

Petition for certiorari  
Reply brief of petitioners

**Sole v. Wyner, No. 06-531**

Brief of petitioner  
Rely brief of petitioners

**Office of Sen. Mark Dayton v. Hanson, No. 06-618**

Amicus brief on behalf of Congressmen Frank and Shays in Support of Appellee (merits stage)

**Tennessee Secondary School Athletic Association v. Brentwood Academy, No. 06-427**

Amicus brief on behalf of National Women's Law Center in support of respondent (merits stage)

**ANR Pipeline v. Louisiana Tax Com'n, No. 05-1606**

Petition for certiorari

**SmithKline Beecham v. Apotex, No. 05-489**

Petition for certiorari  
Reply brief for petitioner  
Supplemental brief in response to US brief

**eBay v. MercExchange, No. 05-130**

Brief of petitioners  
Reply brief of petitioners

**Fort James v. Solo Cup, No. 05-712**

Opposition brief

**Jones v. Flowers, No. 04-1477**

Respondents' brief

**Wagnon v. Prairie Band Potawatomi Nation, No. 04-631**

Amicus brief on behalf of NCAI, Confederated Tribes of Warm Springs Indian Reservation, Pueblos of Isleta, Sandia and Zia, Sisseton Wahpeton Sioux Tribe, Skull Valley Band of Goshute Indians, Tulalip Tribe, and Winnebago Tribe of Nebraska (merits stage)

**Odom v. Yang, No. 04-1157**

Petition for certiorari  
Reply brief of petitioners

**Illinois Cent. R. Co. v. Smallwood, No. 04-831**

Petition for certiorari  
Reply Brief for petitioners

**Exxon v. Allapattah Services, No. 04-70**

Petition for Certiorari  
Reply brief of petitioner  
Petitioner's brief  
Reply brief of petitioner  
Petitioner's supplemental brief

**Merck KGaA v. Integra LifeSciences, No. 03-1237**

Amicus brief on behalf of Genentech and Biogen Idec in support of petitioner (merits stage)

**Arthur Andersen v. U.S., No. 04-368**

Amicus brief on behalf of Washington Legal Foundation and Chamber of Commerce (petition stage)  
Amicus brief on behalf of Washington Legal Foundation and Chamber of Commerce (merits stage)

**Glendale Federal Bank v. U.S., No. 04-626**

Petition for certiorari  
Reply brief of petitioner

**U.S. v. Glendale Federal Bank, No. 04-786**

Brief in opposition

**Baker v. IBP, No. 04-149**

Brief in opposition

**American Nat. Ins. Co. v. Bratcher, No. 04-27**

Petition for certiorari  
Reply brief of petitioners

**Jackson v. Birmingham Board of Education, No. 02-1672**

Amicus brief on behalf of Leadership Conference on Civil Rights in Support of petitioner (merits stage)

**Ward v. State of South Carolina, No. 03-1304**

Petition for certiorari  
Reply brief of petitioner  
Supplemental brief in response to the brief of the US

**F. Hoffman-La Roche, et al. v. Empagran, No. 03-724**

Amicus brief on behalf of European Banks in Support of petitioners (merits stage)

**Intel Corp v. Advanced Micro Devices, No. 02-572**

Amicus brief on behalf of Commission of European Communities supporting reversal (merits stage)

**U.S. v. Bill Jo Lara, No. 03-107**

Amicus on behalf of National Congress of American Indians in support of petitioner (merits stage)

**Jones v. R.R. Donnelley, No. 02-1205**

Respondent's brief

**Entergy Louisiana v. Louisiana Public Service Com'n, No. 02-299**

Petition for certiorari  
Reply brief of petitioner  
Petitioner's brief  
Reply brief

**Grutter v. Bollinger, Nos. 02-241, 02-516**

Amicus filed on behalf of Retired Military Officers and Officials (merits stage)

**Chruby v. Gillis, No. 02-1395**

Petition for certiorari

**Anderson v. Treadwell, No. 02-639**

Petition for certiorari  
Reply brief of petitioner

**American Ins. Association v. Low, Nos. 02-722, 02-733**

Amicus on behalf of Chamber of Commerce and Organization for International Investment in support of petitioners (merits stage)

**Meyer v. Holley, No. 01-1120**

Amicus brief on behalf of National Fair Housing Alliance and AARP in support of respondents (merits stage)

**Abbell, et al. v. U.S., No. 01-1618**

Petition for certiorari  
Reply brief of petitioner

**Visa USA v. MasterCard Int'l, No. 01-1464**

Petition for certiorari  
Reply brief of petitioner

**PacificCare of California, et al. v. McCall, No. 01-199**

Petition for certiorari  
Reply brief for petitioner

**Gurley v. Mills, No. 00-1403**

Petition for certiorari  
Reply brief for petitioner

**Major League Baseball Players Association v. Garvey, No. 00-1210**

Petition for certiorari  
Reply brief for petitioner

**Town of Norwood v. FERC, No. 00-1025**

Petition for certiorari

Reply brief for petitioner

**Pizza Hut v. Papa John's Int'l, No. 00-0095**

Petition for certiorari  
Reply brief of petitioner

**Wal-Mart v. Wells, No. 00-**

Petition for certiorari

**Walker County School District v. Bennett, No. 00-527**

Petition for certiorari  
Reply brief for petitioner

**Major League Baseball Players Association v. Cardtoons, No. 00-0039**

Petition for certiorari  
Reply brief for petitioner

**I&M Rail LINK v. Northstar Navigation, No. 99-1904**

Reply brief for petitioner

**American Airlines v. U.S. DOT, No. 99-1745**

Petition for certiorari  
Reply brief for petitioner

**Armstrong Surgical Ctr. v. Armstrong Co. Mem. Hospital, No. 99-905**

Supplemental brief in response to US brief

**Dallas-Fort Worth Int'l Airport Board v. U.S. DOT, No. 99-1739**

Brief in opposition

**Anadarko Petroleum v. FERC, No. 99-1429**

Petition for certiorari  
Reply brief of petitioners

**Pegram v. Herdrich, No. 98-1949**

Petition for certiorari  
Reply brief of petitioners  
Petitioners' brief

Reply brief

**Rice v. Cayetano, No. 98-818**

Amicus brief on behalf of Kamehameha Schools Bishop Estate Trust in Support of respondents (merits stage)

**Nixon v. Shrink Missouri Government PAC, No. 98-963**

Petition for certiorari  
Reply brief of petitioners  
Petitioners' brief  
Reply brief

**In re Brand Name Prescription Drugs Antitrust Litigation, No. 99-786**

Brief in opposition

**National Collegiate Athletic Ass'n v. Smith, No. 98-84**

Brief of respondent

**California Dental Ass'n v. F.T.C., No. 97-1625**

Amicus on behalf of American Dental Ass'n, et al. in support of petitioners (petition stage)  
Amicus on behalf of American Dental Ass'n, et al. (merits stage)

**State of Minnesota v. Mille Lacs Bd. Of Chippewa Indians, No. 97-1337**

Amicus on behalf of National Congress of American Indians, et al. in support of respondents (merits stage)

**AMA v. Practice Management Information Corp., No. 97-1567**

Petition for certiorari  
Brief in support of petition for rehearing

**Walters v. Metropolitan Educational Enterprise, Nos. 95-259, 95-779**

Amicus on behalf of American Federation of Labor and Congress of Industrial Organizations in Support of petitioners (merits stage)

**Brown v. Pro Football, No. 95-388**

Amicus on behalf of National Hockey League Players, et al. in Support of petitioners (petition stage)  
Amicus on behalf of National Hockey League Players, et al. in Support of petitioners (merits stage)

**Peacock v. Thomas, No. 94-1453**

Amicus on behalf of American Federation of Labor and Congress of Industrial Organizations in support of respondent (merits stage)

**Int'l Union, United Mine Workers of America v. Bagwell, No. 92-1625**

Petitioner's brief  
Reply brief

**General Motors v. Romein, No. 90-1390**

Brief for respondent

**Rawls Sales v. Trustees, UMW Health & Retirement Fund, 92-1775**

Brief in opposition

15. **Litigation:** Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- a. the date of representation;
- b. the name of the court and the name of the judge or judges before whom the case was litigated; and
- c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

I will first describe the two Supreme Court cases at the merits stage in which I served as counsel of record. Thereafter, I will describe courts of appeals cases in which I was lead counsel. Finally, I will describe Supreme Court cases in which I was lead counsel for amici.

1. *Sole v. Wyner*, 551 U.S. 74 (2007). I was counsel of record for Michael Sole, Florida Department of Environmental Protection, et al. in the United States Supreme Court from the fall 2005 through April 2006. I handled the meetings with the United States regarding its position in the Supreme Court and briefed and argued the case for the petitioner Florida state officials. The Supreme Court held that although plaintiffs had obtained a preliminary injunction allowing them to conduct a demonstration on Florida beaches, plaintiffs were not prevailing parties within the meaning of section 1988 of the Civil Rights Act, and thus could not obtain attorneys' fees from Florida, because the district court ultimately rejected plaintiffs' First Amendment claim on its merits.

This case was before the Justices of the U.S. Supreme Court. Co-counsel at Sidley Austin LLP (“Sidley”) was David Petron, 1501 K St. NW, Washington, DC 20005, (202) 736-8000. Co-counsel at Williams, Leininger & Crosby were Carri Leininger and James O. Williams, Jr., 1555 Palm Beach Lakes Blvd., Suite 301, West Palm Beach, FL 33401, (561) 615-5666. Counsel for respondent was Seth Galanter, Morrison & Foerester LLP, 2000 Pennsylvania Ave. NW, Suite 6000, Washington, DC 20006, (202) 8876947. Counsel for the United States was Patricia Millett, Office of the Solicitor General, U.S. Dept. of Justice, 950 Pennsylvania Ave. NW, Washington DC 20530, (202) 514-2217. Ms. Millett now is a partner at Akin, Gump, 1333 New Hampshire Ave., NW, Washington, DC 20036, (202) 887-4000.

2. *Major League Baseball Players Association (“MLBPA”) v. Garvey*, 532 U.S. 1015 (2001); 203 F.3d 380 (9<sup>th</sup> Cir. 2000). Between 1999 and 2001, I represented the MLBPA in the underlying arbitrations in this matter; in the United States District Court for the Central District of California, Docket No. 97-5643-WJR (two unreported decisions); in two appeals to the Ninth Circuit, 203 F.3d 380 and No. 00-56080 (9<sup>th</sup> Cir. Dec. 7, 2000); and in the United States Supreme Court. The district court affirmed the arbitration award in favor of the MLBPA in this matter. Mr. Garvey appealed to the Ninth Circuit, which vacated the award. On remand, the district court reinstated the award; Mr. Garvey again appealed and the Ninth Circuit again vacated the award and ordered that judgment be entered for Mr. Garvey on remand. The MLBPA petitioned for certiorari; and the Supreme Court first issued a stay and then summarily reversed the Ninth Circuit, affirming the arbitration award for the MLBPA and re-establishing the framework for judicial review of arbitration awards.

This case was before U.S. District Court Judge Rea, Ninth Circuit Judges William Hawkins, Steven Reinhardt and District Court Judge Whyte, sitting by designation, and before the Justices of the U.S. Supreme Court. Co-counsel in the Supreme Court were Carter Phillips, Sidley, 1501 K St. NW, Washington, DC 20005, (202) 736-8000, and Laurence Gold, Bredhoff & Kaiser, 805 15<sup>th</sup> St. NW, Suite 1000, Washington, DC 20005, (202) 842-2600. Opposing counsel was Neil Papiano, Iverson, Yoakum, Papiano & Hatch, One Wilshire Building, 624 South Grand Avenue, Suite 2700, Los Angeles, CA 90017, (213) 624-7444.

3. *In re Grand Jury Subpoena Dated May 6, 2004 On Comprehensive Drug Testing, Inc. and Quest Diagnostics, Inc.*, 631 F.3d 1161 (9<sup>th</sup> Cir. 2010). I represented the Major League Baseball Players Association in meeting with the Office of the Solicitor General and responding to the Ninth Circuit’s request for briefing on whether the en banc panel’s decision should be reheard by the full court. This appeal involved the government’s execution of a search warrant for the computer records and laboratory samples of certain major league baseball players at facilities of Comprehensive Drug Testing and Quest Diagnostics and the government’s subsequent issuance of a subpoena for the same materials. The MLBPA and the drug testing companies filed a motion for return of those materials under Fed. R. Crim. P. 41. The en banc court upheld decisions of district courts ordering return of the materials and quashing the subpoena. The court also set forth procedures that govern when the government seeks a warrant to search a computer hard drive or when a government search might result in the seizure of a computer. The court then asked the parties whether the case should be reheard yet again, this time by the full Ninth Circuit. The court substantially revised its en banc decision in response to the parties’ briefing.

This case was before the judges of the Ninth Circuit Court of Appeals en banc. Co-counsel for the MLBPA were Elliot Peters and David Silbert at Kecker & Van Nest, LLP, 710 Sansome St. San Francisco, CA 94111, (415) 391-5400, and Ethan Balough at Coleman & Balough LLP, 225 Bush St., San Francisco, CA 94104. Counsel for the United States was Michael Dreeben, Office of the Solicitor General, U.S. Dept. of Justice, 950 Pennsylvania Ave. NW, Washington DC 20530, (202) 514-2201.

4. *Rabin v. MONY Life Insurance Co.*, No. 09-4907 (2d Cir. July 21, 2010). I represented the MONY Life Insurance Company in plaintiff Rabin's appeal to the Second Circuit of the dismissal of his class action. Plaintiff Rabin had filed a class action alleging that MONY's retained assets accounts for policyholders and beneficiaries constituted breach of contract, breach of fiduciary duty, fraud and other torts. The Second Circuit affirmed the trial court's dismissal of all claims, holding that MONY neither materially breached its contracts nor engaged in deception of any kind. The decision provides a framework for best practices with respect to retained assets accounts.

The case was before Judges Raggi, Lynch and Chin of the U.S. Court of Appeals for the Second Circuit. Co-counsel were Joel Feldman and Gerald Angst of Sidley, 1 South Dearborn St., Chicago, IL 60603, (312) 853-7000. Opposing counsel was Raymond Bragar, Brager, Wexler, Engel & Squire, PC, 885 Third Ave. Suite 3040, New York, NY 10022, (212) 308-5858.

5. *Major League Baseball Players Association v. CDM Marketing & Distribution, Inc.*, 505 F.3d 818 (8<sup>th</sup> Cir. 2007), reh'g en banc denied (Nos. 06-3357, 06-3358) (8<sup>th</sup> Cir. 2007), petition for certiorari denied (No. 07-1099 S. Ct., 2008). I represented the Major League Baseball Players Association in the appeal to the Eighth Circuit, in the petition for rehearing and rehearing en banc in the Eighth Circuit, and in the petition for certiorari to the United States Supreme Court, during 2007 and 2008. The district court and the court of appeals held that CBC's use of certain player rights (names, nicknames, statistics) in its internet fantasy baseball games did not violate the players' publicity rights because CBC's use was protected by the First Amendment, and further that CBC's use did not violate its prior Licensing Agreement with the MLBPA. The Supreme Court denied the MLBPA's petition for certiorari.

This case was before Judges Loken, Arnold and Colloton of the U.S. Court of Appeals for the Eighth Circuit. Co-counsel in the Eighth Circuit were Russell Jones of Shughart, Thomson & Kilroy, PC, 120 West 12<sup>th</sup> St., Kansas City, MO 64105, (816) 421-3355, and Steven Fehr and Donald Aubry, Jolley Walsh, Hurley, Raisher & Aubry, 204 West Linwood, Kansas City, MO 64111, (816) 561-3755. Co-counsel in the Supreme Court also included Mary Braza and G. Michael Halfenger, Foley & Lardner LLP, 777 East Wisconsin Ave., Milwaukee, WI 53202, (414) 2712400. Opposing counsel was Rudolph Telscher, Jr., Harness, Dickey & Pierce, PLC, 7700 Bonhomme, Suite 400, St. Louis, MO 63105, (314) 726-7500.

6. *Tesoro v. Federal Energy Regulatory Commission*, 234 F.3d 1286 (D.C. Cir. 2001). I represented Exxon Company USA in briefing and arguing this petition for review in the United States Court of Appeals for the D.C. Circuit in 2000 and 2001. The case involved the adjusted rates that a shipper who uses the Trans Alaska Pipeline must pay for the crude it receives at the end of the pipeline after that crude has been mingled with oil of varying quality (and thus value)

from numerous other shippers. Without some adjustment, shippers of higher quality oil would unfairly lose and shippers of lower quality oil would unfairly gain. Exxon challenged FERC's decision that it had not been presented with evidence that required it to reconsider the existing formula and that Exxon was precluded from seeking reconsideration of the formula. The D.C. Circuit vacated FERC's decision and remanded the matter for FERC to reconsider the formula.

This case was before Judges Williams, Randolph, and Tatel of the D.C. Circuit. Co-counsel were Eugene Elrod and Kurt Jacobs at Sidley, 1501 K St. NW, Washington, DC 20006, (202)736-8000, and Robert W. Johnson and Laurie Ratchford at Exxon, 800 Bell St. Room 1707H, Houston, TX 77002, (202) 656-3914. Counsel for petitioner Tesoro were Robert H. Benna and Jeffrey DiScuillo, Wright & Talisman, PC, 1200 G St. NW, Suite 600, Washington, DC 20005, (202) 3931200. Counsel for FERC were Timm Abendroth and Andrew Soto, Washington DC 20426, (202) 208-0177.

7. *United States Environmental Protection Agency v. General Electric Co.*, 197 F.3d 592 (2d Cir. 1999). During 1999, I represented General Electric Company in briefing and arguing the appeal to the Second Circuit. This case was an appeal from a district court order granting a motion to quash a subpoena duces tecum addressed to the U.S. EPA to produce documents for use in a lawsuit to which that Agency was not a party. General Electric appealed from that order, and the Second Circuit reversed. That court held that the United States had waived its sovereign immunity from proceedings of this type by enactment of the Administrative Procedure Act, that General Electric was entitled to invoke the APA by moving to enforce the subpoena, and that General Electric was not required to file an independent lawsuit to obtain these documents.

This case was before Judges Miner, Jacobs, and Sack of the Second Circuit. Co-counsel at Sidley were Samuel Gutter and Margaret Deemer, 1501 K St. NW, Washington DC 20005 (202) 736-8000 and at General Electric, Kirk MacFarlane, 640 Freedom Business Center, King of Prussia, PA 19406, (610) 992-7976. Opposing counsel was David Jones, Assistant United States Attorney for Southern District of New York, 100 Church St., 19<sup>th</sup> Floor, New York, NY 10007, (212) 637-2739.

8. *Equal Employment Opportunity Commission v. USX Corp. & United Steelworkers*, 909 F.2d 1475 (3d Cir. 1990) (table). I represented the United Steelworkers of America in intervening in this case in support of USX Corporation, and then briefing and arguing the appeal. In this case, the court considered whether certain provisions of the national pension benefit plans, exemplified by the plan negotiated by USX and the United Steelworkers, violated federal laws barring age discrimination. The court affirmed the district court, upholding the legality of the retirement plans.

This case was before Judges Becker, Greenberg and Garth of the Third Circuit. Co-counsel were Jeffrey Freund, Bredhoff & Kaiser, 805 15th St. NW, Washington, DC 20005, (202) 842-2600 and Carl Frankel, United Steelworkers, Five Gateway Center, Pittsburgh, PA 15222. Counsel for USX Corporation was Hollis Hurd, Jones Day Reavis & Pogue, 500 Grant St., Pittsburgh, PA 15219. Counsel for the EEOC was Carolyn Wheeler, 1801 L St. NW, Washington, DC 20507.

9. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003). From late 2002 through spring 2003, I was counsel of record in the United States Supreme Court for a large

group of Retired Military Officials as *Amici Curiae* in Support of Respondents. The Supreme Court found that diversity can constitute a compelling interest for a public university's use of race as a factor in its admissions policies. In *Gratz*, however, the Court found that the University of Michigan's use of race in its undergraduate admissions policies was not narrowly tailored to serve that interest and invalidated the policies in that respect as violating the Equal Protection Clause of the Constitution and Title VI of the Civil Rights Act. In *Grutter*, the Court upheld the University of Michigan's use of race in its law school admissions policies, finding that the law school's different policies were narrowly tailored. The Retired Military Officials' brief was cited by members of the Court at oral argument and in the opinion for the Court in *Grutter*.

This case was before the Justices of the U.S. Supreme Court. Co-counsel at Sidley were Carter Phillips and Robert Hochman, 1501 K St. NW, Washington, DC 20005, (202) 736-8000; co-counsel at Greenberg Traurig were Joseph Reeder and Robert Charrow, 800 Connecticut Ave. NW, Suite 500, Washington, DC 20006, (202) 331-3125. Counsel for *Grutter* was Kirk Kolbo, Maslon, Edelman Borman, Brand, 3300 Wells Fargo, 90 7<sup>th</sup> St., Minneapolis, MN 55402, (612) 672-8200. Counsel for *Gratz* was David Herr, Maslon, Edelman, Borman, Brand, 3300 Wells Fargo, 90 7<sup>th</sup> St., Minneapolis, MN 55402, (612) 6728200. Counsel for respondent Bollinger in *Grutter* was Maureen Mahoney, Latham & Watkins, 555 Eleventh St. NW, Washington, DC 20004, (202) 637-2200. Counsel for respondent Bollinger in *Gratz* was John Payton, Wilmer, Cutler & Pickering, 2445 M St. NW, Washington, DC 20037, (202) 663-6000, now NAACP Legal Defense Fund, 99 Hudson St., New York, NY 10013. Counsel for the United States was Theodore Olsen, Office of the Solicitor General, U.S. Dept. of Justice, 950 Pennsylvania Ave. NW, Washington DC 20530, (202) 514-2201, now Gibson, Dunn, 1050 Connecticut Ave. NW, Washington, DC 20036, (202) 955-8668.

10. *United States v. Lara*, 541 U.S. 193 (2004). I represented the National Congress of American Indians as *amicus curiae* in support of the petitioner United States during 2003. The Supreme Court reversed the court below, finding that prosecuting a nonmember Indian under federal and tribal law does not violate the Double Jeopardy Clause of the Constitution. The Court held that an Indian tribe's right to prosecute nonmember Indians is an inherent aspect of their sovereignty. Although Congress may decide to restrict this right, it may also choose not to do so or to eliminate prior statutory restrictions.

This case was before the Justices of the U.S. Supreme Court. Co-counsel were Carter Phillips at Sidley, 1501 K St. NW, 1501 K St. NW, Washington, DC 20005, (202) 736-8000, and Riyaz Kanji at Kanji & Katzen PLLC, 201 South Main St., Suite 1000, Ann Arbor, MI 48104, (734) 769-5400. Counsel for petitioner was Edwin Kneedler, Office of the Solicitor General, U.S. Dept. of Justice, 950 Pennsylvania Ave. NW, Washington DC 20530, (202) 514-2201. Counsel for respondent was Alexander Reichert, 405 Bruce Ave., Suite 100A, Grand Forks, ND 58201, (701) 787-8802.

16. **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or

organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

Most of my significant legal activities have involved appellate litigation, but I have also played a substantial counseling role for clients. Three illustrations of significant work of that type follow.

Since 1987, I have served as one of the primary outside counsel to the Major League Baseball Players Association. In that relationship of long standing, I have provided the Association with legal advice and guidance in connection with (i) relations with members, including counseling, grievances, and litigation arising out of matters related to their duty of fair representation, agent regulation, and internal governance questions, (ii) collective bargaining and labor relations, including matters before the National Labor Relations Board, federal district courts, courts of appeals, and the Supreme Court, and (iii) general commercial matters, including the World Cup of Baseball, the licensing of player publicity rights, players' rights with respect to medical privacy issues, the labor exemption from the anti-trust laws, and the preemption of state laws. The Association's legal issues run the gamut from internal personnel matters, to grievances, arbitrations and issues arising out of their negotiations and collective bargaining agreement with Major League Clubs, to compliance and litigation under federal laws such as the NLRA, the LMRDA, the LMRA, the federal anti-discrimination laws, HIPAA, the Curt Flood Act, and the First and Fourth Amendments of the Constitution. I serve as the Association's counsel when it confronts a substantial challenge which involves a legal issue, such as the 1994 strike, the proposed contraction of the Minnesota Twins, the legal issues arising out of steroids, or the protection of player publicity rights. The Association has a general counsel, but in many ways, I have served for almost two decades as an adjunct general counsel to the Association.

In 2007, I was appointed to my law firm's Office of General Counsel. That office acts as the firm's principal internal legal counsel and is responsible for overseeing, coordinating and advising on all the firm's legal affairs, including pending and threatened claims against or related to the firm. In addition, the OGC addresses questions of risk management, large and small, that arise in the daily operation of the firm or for the law firms generally, in coordination with the Professional Responsibility Committee. As the Washington, D.C. office's representative, I also receive, evaluate and address issues that arise in that office.

From 1995-2000, I served as a member of the Congressional Board of Compliance. That Board administers the Office of Compliance which applies the Congressional Accountability Act to the majority of legislative employees. Because we were the first Board, we were tasked with crafting the regulations that applied virtually all major labor and employment laws in the legislative branch, including Title VII, the ADEA, the FMLA, OSHA, and the FLRA. In addition, we drafted the Office's procedural regulations and established its structure. When legislative employees brought complaints under the Act that could not be resolved through the Act's mediation and conciliation process, the Board also served as the adjudicatory body that decided cases brought under

the Act. Finally, the Act also requires the Board to periodically report on its implementation and application to the legislative branch.

17. **Teaching:** What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

Before I attended law school, during the 1980-1981 school year, I taught history and coached field hockey at the Park School in Buffalo, NY. I am one of a group of lawyers in Sidley Austin LLP's appellate group that teaches classes at the Supreme Court clinic at Northwestern Law School (2006-present). I generally teach classes entitled "Effective Brief Writing," "Petitions for Certiorari," or "Reply Briefs." I have occasionally guest taught classes at Georgetown Law School on topics such as "Uses of Amicus Briefs."

18. **Deferred Income/ Future Benefits:** List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

Pursuant to Sidley's partnership agreement, the firm maintains a retirement differential account (a non-qualified retirement plan) based on the firm's accruals for services in years when I was a partner. Upon withdrawal from the firm, the account balance attributed to me will be determined and this balance will be held by the firm. No additional contributions will be made by me or the firm after my departure.

As an employee of Bredhoff & Kaiser, I participated in the 401(k) profit sharing plan. The account balance in this plan will continue to be held by the firm, but no additional contributions have been made or will be made to this account by the firm.

Pursuant to Sidley's partnership agreement, as soon as practical, but not more than 18 months following my departure, the firm will make a lump sum payment of my capital account and partnership share for service performed until departure.

Pursuant to Sidley's partnership agreement, the firm will make contributions to the firm's Savings and Investment Plan, Retirement Plan for Partners and 1994 Retirement Plan for Partners in such amounts as are required on my behalf for calendar year 2010 and 2011 equal to the maximum allowable as I have chosen under the plans. The account balances under these plans will continue to be held by the firm, but no additional contributions will be made to these accounts by the firm or me following my departure.

Pursuant to Sidley's partnership agreement, the firm withheld money to fund my monetary contributions to the Cash Balance Retirement Plan based on my service credits, interest credit and investment losses for my service in 2010 and 2011. The account

balances in this plan will continue to be held by the firm, but no additional contributions will be made by the firm or me after my departure.

These items and arrangements are listed on the Financial Disclosure form which is attached. Otherwise, I have no arrangements for future compensation.

19. **Outside Commitments During Service:** Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service? If so, explain.

I have no such plans.

20. **Sources of Income:** List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, licensing fees, honoraria, and other items exceeding \$500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

See attached SF 278.

21. **Statement of Net Worth:** Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Net Worth Statement.

22. **Potential Conflicts of Interest:**

- a. Identify the family members or other persons, parties, affiliations, pending and categories of litigation, financial arrangements or other factors that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

In connection with the nomination process, I have consulted with the Office of Government Ethics and the Department of Justice's designated agency ethics official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of an ethics agreement that I have entered into with the Department's designated agency ethics official.

- b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

In connection with the nomination process, I have consulted with the Office of Government Ethics and the Department of Justice's designated agency ethics official to identify potential conflicts of interest. Any potential conflicts of

interest will be resolved in accordance with the terms of an ethics agreement that I have entered into with the Department's designated agency ethics official.

23. **Pro Bono Work:** An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each. If you are not an attorney, please use this opportunity to report significant charitable and volunteer work you may have done.

I have been a recipient of the Sidley Austin Pro Bono Award in each year since its inception (2006-2010). This indicates that I have fulfilled the ABA's challenge to private lawyers to work specified pro bono hours for each of those years. The award I received from the Lawyers Committee, see above, was for a pro bono representation. The following list sets forth some of my pro bono matters from 1998 to the present.

*NCAA v. Renee Smith* (U.S. Supreme Court and remand to the Third Circuit), representation of Renee Smith, female athlete challenging rule alleged to be discriminatory, in appeals arising under Title IX of the Civil Rights Act, approximately 270 hours. Spring or summer 1998 – early 2001.

*Gilliam et al. v. HBE Corp.* (Eleventh Circuit), representation of Washington Lawyers Committee for Civil Rights in appeal involving allegations of discrimination under 42 U.S.C. section 1981 and other civil rights statutes, approximately 160 hours. Fall of 2000 –summer 2001.

*Violence Policy Center v. Department of Justice* (D.C. D.C.), representation of Violence Policy Center in petition for review challenging agency action under the Administrative Procedure Act, approximately 65 hours. May 2001-Fall 2001.

*Grutter v. Bollinger/Gratz v. Bollinger* (U.S. Supreme Court), representation of Retired Military Officers and Officials as amici curiae in cases challenging the lawfulness of collegiate admissions policies under civil rights laws and the Constitution, approximately 130 hours. Late 2002-Spring 2003.

*Communities for Equity v. Michigan High School Athletic Association* (Sixth Circuit), representation of civil rights organizations in amicus filings in case involving challenges to scheduling of high school athletic seasons under Title IX of the Civil Rights Act, approximately 60 hours. 2005-2006.

*Arthur Andersen LLP v. United States* (U.S. Supreme Court), representing Washington Legal Foundation in amicus briefs in case challenging the criminal conviction of Arthur Andersen, approximately 100 hours for amicus filing in support of petition and second filing on the merits. Summer 2004-Spring 2005.

*Cook v. Rumsfeld* (First Circuit), representation of retired military officers in case challenging the legality of the don't ask, don't tell policy, approximately 56 hours. Summer 2006-November 2006.

*Gomez-Perez v. Potter* (U.S. Supreme Court), representation of petitioner in case challenging the lawfulness of alleged retaliation under federal anti-discrimination laws, approximately 50 hours. Fall 2007-Spring 2008.

*Engquist v. Oregon Dept. of Agriculture* (U.S. Supreme Court), representation of petitioner in case challenging termination under the Equal Protection Clause, approximately 85 hours. January 2008-May 2008.

*Berghius v. Smith* (U.S. Supreme Court), representation of NAACP Legal Defense and Education Fund as amicus in case challenging constitutionality of jury selection process, approximately 60 hours. Winter 2009-Spring 2010.

*Beer v. United States* (U.S. Supreme Court), representation of Federal Circuit Bar Association and other bars as amici in support of a petition for certiorari on question whether the Compensation Clause has been violated in judicial pay, approximately 80 hours. Late Fall 2009 – Summer 2010.

*Equal Rights Center v. Post Properties* (D.C. Circuit), representation of the Fair Housing Alliance and other groups as amici in support of the appeal of a decision under the Fair Housing Act, approximately 70 hours. Spring 2010-present.

I am a regular volunteer for the National Association of Attorneys General. I grade the Association's best brief contest each year; I conduct moot courts for the Association; and I teach at its Supreme Court seminar.

In addition to legal pro bono work, I have volunteered substantial time in my children's schools, Lafayette Elementary School, the Lowell School, and the Field School. Specifically, I was the co-chair of the grocery scrip fund raising venture at Lafayette for several years; I served as the "class parent" for multiple years at both Lowell and Field School, including this year, which involves coordinating and leading volunteer activities at the school. In addition, I have volunteered my time in connection with the Justice Seminar at Field, judging the high school moot courts and occasionally teaching classes.

**FINANCIAL STATEMENT**  
**NET WORTH**

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks	961	797	.40	Notes payable to banks-secured	0		
U.S. Government securities-add schedule	15	000	.00	Notes payable to banks-unsecured	0		
Listed securities-add schedule	34	156	.65	Notes payable to relatives	0		
Unlisted securities--add schedule	0			Notes payable to others	0		
Accounts and notes receivable:	0			Accounts and bills due	0		
Due from relatives and friends	0			Unpaid income tax	0		
Due from others	0			Other unpaid income and interest	0		
Doubtful	0			Real estate mortgages payable-see schedule	10	529	.12
Real estate owned-see schedule	973	580	.00	Chattel mortgages and other liens payable	0		
Real estate mortgages receivable	0			Other debts-itemize:	0		
Autos and other personal property	12	575	.00				
Cash value-life insurance	0						
Other assets itemize:	1923	940	.83				
				Total liabilities	10	529	.12
				Net Worth	3910	520	.76
Total Assets	3921	049	.88	Total liabilities and net worth	3921	049	.88
CONTINGENT LIABILITIES	0			GENERAL INFORMATION			
As endorser, comaker or guarantor	0			Are any assets pledged? (Add schedule)	no		
On leases or contracts	0			Are you defendant in any suits or legal actions?	no		
Legal Claims	0			Have you ever taken bankruptcy?	no		
Provision for Federal Income Tax	0						
Other special debt	0						

**FINANCIAL STATEMENT**  
**NET WORTH SCHEDULES**

Government Securities

The government securities consist of U.S. Savings Bonds in the names of my children.

Listed Securities

Sprint Nextel 722 shares (\$4.58 per share)	\$ 3,306.76
DuPont Common Stock 120 shares (\$ 49.03 per share)	\$ 5,883.60
Edwards Life Sciences 50 shares (\$ 78.65 per share)	\$ 3,932.50
A-Power Energy Generation Sys. 150 shares (\$ 5.65 per share)	\$ 847.50
Cardinal Health Common Stock 42 shares (\$ 39.24 per share)	\$ 1,648.08
Baxter Common Stock 299 shares (\$ 49.21 per share)	\$ 14,713.79
Windstream Common Stock 72 shares (\$ 13.29 per share)	\$ 956.88
Carefusion Common Stock 21 shares (\$ 25.22 per share)	\$ 529.62
Century Link 52 shares (\$ 44.96 per share)	\$ 2,337.92

Real estate owned/Mortgage

Washington, DC [REDACTED]	\$ 973,580.00
Nationstar Mortgage	\$ 10,529.00

Autos and Other Personal Property

2003 Honda Odyssey (trade in value)  
2004 Honda Accord (trade in value)

Other Assets

Sidley Austin Law Partnership Capital Account	\$ 108,000.00
Bredhoff & Kaiser 401(k) Profit Sharing Plan	\$ 290,731.00
Sidley Savings & Investment Plan	\$ 127,955.10
Sidley Austin Retirement Plan for Partners	\$ 242,392.66
Sidley Austin 1994 Retirement Plan for Partners	\$ 226,201.70
Fidelity Asset Manager 50% FASMX	\$ 26,383.00
Sidley Austin LLP Cash Balance Plan	\$ 378,405.71
Sidley Austin Retirement Differential Account	\$ 164,772.66
Spouse's US Government retirement account	\$ 359,099.00

SF 278 (Rev. 04/2000) 5 C.F.R. Part 2634 U.S. Office of Government Ethics		Executive Branch Personnel PUBLIC FINANCIAL DISCLOSURE REPORT						Form Approved OSM No. 3209-0001
Date of Appointment, Candidacy Election, or Nomination (Month, Day, Year)		Reporting Status (Check Appropriate Box)	Incumbent <input type="checkbox"/>	Calendar Year Covered by Report	New Entrant, Nominee, or Candidate <input checked="" type="checkbox"/>	Termination Filer <input type="checkbox"/>	Termination Date (If Applicable) (Month, Day, Year)	<b>Fee for Late Filing</b> Any individual who is required to file this report and does so more than 30 days after the date the report is required to be filed, or if an extension is granted, more than 30 days after the last day of the filing extension period, shall be subject to a \$200 fee.
Reporting Individual's Name		Last Name		First Name and Middle Initial		A		
Position for Which Filing		Title of Position		Department or Agency (If Applicable)				<b>Reporting Periods</b> Incumbent: The reporting period is the preceding calendar year, except: Part II of Schedule C and Part I of Schedule D where you must also include the filing year up to the date you file. Part II of Schedule D is not applicable.
Location of Present Office (or forwarding address)		Address (Number, Street, City, State, and ZIP Code)		Telephone No. (Include Area Code)				
Professional Field with the Federal Government During the Preceding 12 Months (If Not Same as Above)		Title of Position(s) and Date(s) Held		202-738-8000				<b>Termination Filers:</b> The reporting period begins at the end of the period covered by your previous filing and ends at the date of termination. Part II of Schedule D is not applicable.
Presidential Nominations Subject to Senate Confirmation		Name of Congressional Committee Considering Nomination		Do You Intend to Create a Qualified Diversified Trust?				
Certification		Signature of Reporting Individual		Date (Month, Day, Year)				<b>Nominees, New Entrants and Candidates for President and Vice President:</b> Schedule A—The reporting period for income (BLOCK C) is the preceding calendar year and the current calendar year up to the date of filing. Value assets as of any date you choose that is within 31 days of the date of filing. Schedule B—Not applicable.
I CERTIFY that the statements I have made on this form and all attached schedules are true, complete and correct to the best of my knowledge.		Signature of Office Reviewer		Date (Month, Day, Year)				
Other Reviewer (If Required by Agency)		Signature of Designated Agency Ethics Officer/Reviewing Official		Date (Month, Day, Year)				Schedule C, Part I (Limbs/Items)—The reporting period is the preceding calendar year and the current calendar year up to any date you choose that is within 31 days of the date of filing.
Agency Ethics Officer's Opinion		Signature		Date (Month, Day, Year)				
On the basis of information contained in this report, I conclude that the filer is in compliance with applicable laws and regulations (subject to any comments in this box below).		Signature		Date (Month, Day, Year)				Schedule C, Part II (Agreements or Arrangements)—Show any agreements or arrangements as of the date of filing.
Office of Government Ethics Use Only		Signature		Date (Month, Day, Year)				
Comments of Reviewing Officials (If additional space is required, use the reverse side of this sheet)								<b>Schedule D—</b> The reporting period is the preceding two calendar years and the current calendar year up to the date of filing.
(Check box if filing extension granted & indicate number of days _____) <input type="checkbox"/>								
Agency Use Only								
OGES Use Only								



Reporting Individual's Name Seitz, Virginia A		SCHEDULE A continued (Use only if needed)										Page Number 3 of 17									
Assets and Income		Valuation of Assets at close of reporting period										Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.									
BLOCK A		BLOCK B										BLOCK C									
												Type	Amount	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honorary						
												None (or less than \$201)	None (or less than \$201)								
1	DuPont Common Stock	<input checked="" type="checkbox"/>																			
2	Edwards Life Sciences	<input checked="" type="checkbox"/>																			
3	A-Power Energy Generation Systems	<input checked="" type="checkbox"/>																			
4	Cardinal Health Common Stock	<input checked="" type="checkbox"/>																			
5	Baxter Common Stock		<input checked="" type="checkbox"/>																		
6	Einbarg Common Stock	<input checked="" type="checkbox"/>																			
7	Windstream Common Stock	<input checked="" type="checkbox"/>																			
8	Sidley Austin Law Partnership Capital Account			<input checked="" type="checkbox"/>																	
9	Bredhoff & Kaiser 401(k) Profit Sharing Plan (components listed below)																				

\* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.





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Reporting Individual's Name Seitz, Virginia A		SCHEDULE A continued (Use only if needed)										Page Number 8 of 17		
Assets and Income		Valuation of Assets at close of reporting period							Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.					
BLOCK A		BLOCK B							BLOCK C					
		Amount (or less than \$1,001)							Type					Date (Mo., Day, Yr.) Only if Honorary
		\$1,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$250,000	\$250,001 - \$500,000	Over \$1,000,000*	None (or less than \$201)	Dividends	Interest	Capital Gains	Other	Other Income (Specify Type & Actual Amount)	
1	-Vanguard Equity Income Fund		X					X						
2	Sidley Austin 1994 Retirement Plan for Partners (components listed below)													
3	-Vanguard Equity Income Fund		X					X						
4	-Harbor Capital Appreciation 142X		X					X						
5	-SSigA S&P 500 Index Fund			X				X						
6	-Fixed Income Fund		X					X						
7	CenturyLink Common Stock	X							X					
8	CenturyLink	X							X					
9	U.S. Savings Bonds (DC)	X							X	X				

\* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.



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**Do not complete Schedule B if you are a new entrant, nominee, or Vice Presidential or Presidential Candidate**

<b>Reporting Individual's Name</b> Switz, Virginia A	<b>SCHEDULE B</b>	<b>Page Number</b> 8 of 17
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**Part I: Transactions**

Report any purchase, sale, or exchange by you, your spouse, or dependent children during the reporting period of any real property, stocks, bonds, commodity futures, and other securities when the amount of the transaction exceeded \$1,000. Include transactions that resulted in a loss.

Do not report a transaction involving property used solely as your personal residence, or a transaction solely between you, your spouse, or dependent child. Check the "Certificate of divestiture" block to indicate sales made pursuant to a certificate of divestiture from OGE.

None

Line	Identification of Assets	Transaction Type (a)	Date (Mo., Day, Yr.)	Amount of Transaction (a)							Certificate of Divestiture
				None	\$1-\$100	\$100-\$1,000	\$1,000-\$10,000	\$10,000-\$50,000	\$50,000-\$100,000	\$100,000+	
Example	Central Airlines Common		2/1/99								
1											
2											
3											
4											
5											

\*This category applies only if the underlying asset is solely that of the filer's spouse or dependent children. If the underlying asset is either held by the filer or jointly held by the filer with the spouse or dependent children, use the other higher category of value, as appropriate.

**Part II: Gifts, Reimbursements, and Travel Expenses**

For you, your spouse and dependent children, report the source, a brief description, and the value of: (1) gifts (such as tangible items, transportation, lodging, food, or entertainment) received from one source totaling more than \$260, and (2) travel-related cash reimbursements received from one source totaling more than \$260. For conflicts analysis, it is helpful to indicate a basis for receipt, such as personal friend, agency approval under 5 U.S.C. § 4111 or other statutory authority, etc. For travel-related gifts and reimbursements, include travel itinerary, dates, and the nature of expenses provided. Exclude anything given to you by the U.S. Government; given to your agency in connection with official travel; received from relatives; received by your spouse or dependent child totally independent of their relationship to you; or provided as personal hospitality at the donor's residence. Also, for purposes of aggregating gifts to determine the total value from one source, exclude items worth \$104 or less. See instructions for other exclusions.

None

Line	Source (Name and Address)	Brief Description	Value
Examples	NAT'L Assn. of Book Collectors, NY, NY	Airline ticket, hotel room & meals incident to national conference 6/15/99 (personal activity unrelated to duty)	\$500
	Frank Jones, San Francisco, CA	Leather briefcase (personal friend)	\$300
1			
2			
3			
4			
5			

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**Do not complete Schedule B if you are a new entrant, nominee, or Vice Presidential or Presidential Candidate**

Reporting Individual's Name Switz, Virginia A	<b>SCHEDULE B continued</b> (Use only if needed)	Page Number 9 of 17
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**Part I: Transactions**

Line	Identification of Assets	Transaction Type (a)		Date (Mo., Day, Yr.)	Amount of Transaction (a)								
		Buy	Sell		\$0	\$1 to \$999	\$1,000 to \$9,999	\$10,000 to \$49,999	\$50,000 to \$99,999	\$100,000 to \$499,999	\$500,000 or more		
1													
2													
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15													
16													

\*This category applies only if the underlying asset is solely that of the filer's spouse or dependent children. If the underlying asset is either held by the filer or jointly held by the filer with the spouse or dependent children, use the other higher categories of value, as appropriate.

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Reporting Individual's Name: **Selitz, Virginia A**      **SCHEDULE C**      Page Number: **10 of 17**

**Part I: Liabilities**  
Report liabilities over \$10,000 owed to any one creditor at any time during the reporting period by you, your spouse, or dependent children. Check the highest amount owed during the reporting period. Exclude a mortgage on your personal residence unless it is rented out; loans secured by automobiles, household furniture or appliances; and liabilities owed to certain relatives listed in instructions. See instructions for revolving charge accounts. None

Creditor's Name and Address	Type of Liability	Date Incurred	Interest Rate	Term if applicable	Category of Amount or Value (a)															
					\$1-\$500	\$500-\$1,000	\$1,000-\$2,500	\$2,500-\$5,000	\$5,000-\$10,000	\$10,000-\$15,000	\$15,000-\$20,000	\$20,000-\$25,000	\$25,000-\$30,000	\$30,000-\$35,000	\$35,000-\$40,000					
Example: First District Bank, Washington, DC	Mortgage on rental property, Delaware	1991	6%	25 yrs.																
John Jones, 12110, Washington, DC	Personal note	1999	10%	on demand																
1																				
2																				
3																				
4																				
5																				

\*This category applies only if the liability is solely that of the filer's spouse or dependent children. If the liability is that of the filer or a joint liability of the filer with the spouse or dependent children, mark the other higher category, as appropriate.

**Part II: Agreements or Arrangements**  
Report your agreements or arrangements for: (1) continuing participation in an employee benefit plan (e.g. pension, 401k, deferred compensation); (2) continuation of payment by a former employer (including severance payments); (3) leaves of absence; and (4) future employment. See instructions regarding the reporting of negotiations for any of these arrangements or benefits. None

Example	Status and Terms of any Agreement or Arrangement	Parties	Date
	Pursuant to partnership agreement, will receive lump sum payment of capital account & partnership share calculated on service performed through 1/00.	One Jones & Smith, Hometown, State	7/85
1	Pursuant to my partnership agreement, as soon as practical but not more than 18 months following my departure, the firm will make a lump sum payment of capital account and partnership share for service performed until departure.	Sidley Austin LLP, Washington, DC	01/07
2	Pursuant to my partnership agreement, the firm will make contributions to the firm's Savings and Investment Plan, Retirement Plan for Partners and 1994 Retirement Plan for Partners in such amounts as are required on my behalf for	Sidley Austin LLP, Washington, DC	1/98
3	calendar year 2010 equal to the maximum allowable as I have chosen under this plan. The account balances under these plans will continue to be held by the firm, but no additional contributions will be made to these accounts by the firm.		
4	or not following my departure.		
5	Pursuant to my partnership agreement, the firm withheld money to fund my mandatory contributions to the Cash Balance Retirement Plan based on my service credit, interest credit and investment losses for my service in	Sidley Austin LLP, Washington, DC	1/07
6	2010. The account balances in this plan will continue to be held by the firm, but no additional contributions will be made by the firm or me after my departure.		

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Reporting Individual's Name: **Selitz, Virginia A** SCHEDULE C Page Number: 11 of 17

**Part I: Liabilities** None

Report liabilities over \$10,000 owed to any one creditor at any time during the reporting period by you, your spouse, or dependent children. Check the highest amount owed during the reporting period. Exclude a mortgage on your personal residence unless it is rented out; loans secured by automobiles, household furniture or appliances; and liabilities owed to certain relatives listed in instructions. See instructions for revolving charge accounts.

Creditor (Name and Address)	Type of Liability	Date Incurred	Interest Rate	Terms if applicable	Category of Amount or Value (s)									
					\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$250,000	\$250,001 - \$500,000	\$500,001 - \$1,000,000	\$1,000,001 - \$2,500,000	\$2,500,001 - \$5,000,000	\$5,000,001 - \$10,000,000		
<i>Example</i> First Trust Bank, Washington, DC	Mortgage on personal property, Delaware	1991	8%	25 yrs										
<i>Example</i> First Trust Bank, Washington, DC	Promissory note	1999	10%	on demand										
1														
2														
3														
4														
5														

\*This category applies only if the liability is solely that of the filer's spouse or dependent children. If the liability is that of the filer or a joint liability of the filer with the spouse or dependent children, mark the other higher categories, as appropriate.

**Part II: Agreements or Arrangements** None

Report your agreements or arrangements for: (1) continuing participation in an employee benefit plan (e.g. pension, 401k, deferred compensation); (2) continuation of payment by a former employer (including severance payments); (3) leaves of absence; and (4) future employment. See instructions regarding the reporting of negotiations for any of these arrangements or benefits.

Status and Terms of any Agreement or Arrangement	Parties	Date
<i>Example</i> Pursuant to partnership agreement, will receive lump sum payment of capital account & partnership share calculated on service performed through 1/06.	Doe Jones & Smith, Hometown, State	7/85
1 Pursuant to the firm's partnership agreement, the firm maintains a retirement differential account (a non-qualified retirement plan) based on the firm's accruals for services in years when I was a partner. Upon withdrawal from the firm,	Sidley Austin LLP, Washington, DC	01/07
2 the account balance attributed to me will be determined and this balance will be held by the firm, no additional contributions will be made by me or the firm after my departure.		
3 As an employee of Bradhoff & Kaiser, I participated in the 401(k) profit sharing plan. The account balance in this plan will continue to be held by the firm, but no additional contributions have been or will be made to this account by the	Bradhoff & Kaiser LLP, Washington, DC	11/98
4 firm or me after my departure.		
5		
6		

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Reporting Individual's Name Seltz, Virginia A	<b>SCHEDULE D</b>	Page Number 12 of 17
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**Part I: Positions Held Outside U.S. Government**  
 Report any positions held during the applicable reporting period, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature. None

Examples	Organization (Name and Address)	Type of Organization	Position Held	From (Mo./Yr.)	To (Mo./Yr.)
	Na'l Assn. of Stock Collectors, NY, NY	Non-profit education	Trustee	8/97	Present
	Doe Jones & Smith, Hometown, State	Law firm	Partner	7/85	L'00
1	Sidley Austin LLP, Washington, DC 20005	Law Firm	partner	01/1998	PRESENT
2	National Association of Women Lawyers	Professional Association	member, Committee for Evaluation of Supreme Court nominees	01/2005	09/2010
3					
4					
5					
6					

**Part II: Compensation in Excess of \$5,000 Paid by One Source**  
 Report sources of more than \$5,000 compensation received by you or your business affiliation for services provided directly by you during any one year of the reporting period. This includes the names of clients and customers of any corporation, firm, partnership, or other business enterprise, or any other non-profit organization when you directly provided the services generating a fee or payment of more than \$5,000. You need not report the U.S. Government as a source. None   
 Do not complete this part if you are an Incumbent, Termination Filer, or Vice Presidential or Presidential Candidate.

Examples	Source (Name and Address)	Brief Description of Duties
	Doe Jones & Smith, Hometown, State	Legal services
	Metre University (client of Doe Jones & Smith, Hometown, State)	Legal services in connection with university construction
1	Sidley Austin LLP, Washington, DC	Legal services provided as a partner of the firm
2	Adlance Pipeline LP (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings
3	American Bankers Association (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings
4	American Electric Power (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings
5	AvintMaritor, Inc. (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings
6	AT&T Corp. (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings

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DC/Adm. Number revised 1.8.2 (1/10/2004)

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**Part I: Positions Held Outside U.S. Government**  
Report any positions held during the applicable reporting period, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature. None

	Organization (Name and Address)	Type of Organization	Position Held	From (Mo., Yr.)	To (Mo., Yr.)
Examples	Marl Aest of Rock Collectors, NY, NY	Nonprofit/charitable	President	6/92	Present
1	Doe Jones & Smith, Hometown, State	Law firm	Partner	7/85	1/00
2					
3					
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**Part II: Compensation in Excess of \$5,000 Paid by One Source**  
Report sources of more than \$5,000 compensation received by you or your business affiliation for services provided directly by you during any one year of the reporting period. This includes the names of clients and customers of any corporation, firm, partnership, or other business enterprise, or any other non-profit organization when you directly provided the services generating a fee or payment of more than \$5,000. You need not report the U.S. Government as a source. Do not complete this part if you are an incumbent, Termination Filer, or Vice Presidential or Presidential Candidate. None

	Source (Name and Address)	Brief Description of Duties
Examples	Doe Jones & Smith, Hometown, State	Legal services
	Metro University (client of Doe Jones & Smith), Hometown, State	Legal services in connection with university construction
1	Bayer Material Science (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings
2	State of California (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings
3	Chamber of Commerce (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings
4	Consolidated Edison of New York (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings
5	Correctional Services Corporation (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings
6	CSX Transportation (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings

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Reporting Individual's Name Seitz, Virginia A	<b>SCHEDULE D</b>	Page Number 14 of 17
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**Part I: Positions Held Outside U.S. Government**  
Report any positions held during the applicable reporting period, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature. None

	Organization (Name and Address)	Type of Organization	Position Held	From (Mo./Yr.)	To (Mo./Yr.)
Examples	Marl Ann, of Rock Collectors, NY, NY	Non-profit education	President	6/92	Present
	Doe Jones & Smith, Hometown, State	Law firm	Partner	7/85	1/00
1					
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**Part II: Compensation in Excess of \$5,000 Paid by One Source**  
Report sources of more than \$5,000 compensation received by you or your business affiliation for services provided directly by you during any one year of the reporting period. This includes the names of clients and customers of any corporation, firm, partnership, or other business enterprise, or any other non-profit organization when you directly provided the services generating a fee or payment of more than \$5,000. You need not report the U.S. Government as a source. Do not complete this part if you are an Incumbent, Termination Filer, or Vice Presidential or Presidential Candidate. None

	Source (Name and Address)	Brief Description of Duties
Examples	Doe Jones & Smith, Hometown, State	Legal services
	Metro University (client of Doe Jones & Smith), Moneytown, State	Legal services in connection with university construction
1	Delta Airlines, Inc. (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings
2	Discover Financial Services (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings
3	Duke Energy Corporation (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings
4	Eli Lilly & Company (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings
5	GlaxoSmithKline (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings
6	The Hartford Financial Services Group (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings

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Reporting Individual's Name <b>Seitz, Virginia A</b>	<b>SCHEDULE D</b>	Page Number <b>15 of 17</b>
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**Part I: Positions Held Outside U.S. Government**  
Report any positions held during the applicable reporting period, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature. None

	Organization (Name and Address)	Type of Organization	Position Held	From (Mo., Yr.)	To (Mo., Yr.)
Examples	Nat'l Assn. of Book Collectors, NY	Non-profit/education	President	6/92	Present
	Doe Jones & Smith, Hometown, State	Law firm	Partner	7/85	1/00
1					
2					
3					
4					
5					
6					

**Part II: Compensation in Excess of \$5,000 Paid by One Source**  
Report sources of more than \$5,000 compensation received by you or your business affiliation for services provided directly by you during any one year of the reporting period. This includes the names of clients and customers of any corporation, firm, partnership, or other business enterprise, or any other non-profit organization when you directly provided the services generating a fee or payment of more than \$5,000. You need not report the U.S. Government as a source. None   
Do not complete this part if you are an Incumbent, Termination Filter, or Vice Presidential or Presidential Candidate.

	Source (Name and Address)	Brief Description of Duties
Examples	Doe Jones & Smith, Hometown, State	Legal services
	Metro University (client of Doe Jones & Smith), Hometown, State	Legal services in connection with university construction
1	Kaplan, Inc. (Sidley Austin LLP client)	Legal advice in connection with regulations
2	Life Investors Ins. Company of America (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings
3	Major League Baseball Players Association (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings
4	Jack Markel, Governor of DE (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings
5	Merrill Lynch & Co. (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings
6	Monumental Life Insurance Co. (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings

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**Part I: Positions Held Outside U.S. Government**  
 Report any positions held during the applicable reporting period, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature. None

Examples	Organization (Name and Address)	Type of Organization	Position Held	From (Mo., Yr.)	To (Mo., Yr.)
	Met Arts. of Book Collectors, NY, NY	Non-profit education	President	6/92	Present
1	Doer Jones & Smith, Hometown, State	Law firm	Partner	7/85	1/00
2					
3					
4					
5					
6					

**Part II: Compensation in Excess of \$5,000 Paid by One Source**  
 Report sources of more than \$5,000 compensation received by you or your business affiliation for services provided directly by you during any one year of the reporting period. This includes the names of clients and customers of any corporation, firm, partnership, or other business enterprise, or any other non-profit organization when you directly provided the services generating a fee or payment of more than \$5,000. You need not report the U.S. Government as a source. None

Examples	Source (Name and Address)	Brief Description of Duties
	Doer Jones & Smith, Hometown, State	Legal services
	Micro University (client of Doer Jones & Smith), Hometown, State	Legal services in connection with university construction
1	MONY Life Insurance Co. (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings
2	National Congress of American Indians (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings
3	Navajo Nation (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings
4	Newer America Inc. (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings
5	Pacific Gas & Electric Co. (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings
6	Rambou, Inc. (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings

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Reporting Individual's Name <b>Seitz, Virginia A</b>	<b>SCHEDULE D</b>	Page Number <b>17 of 17</b>
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**Part I: Positions Held Outside U.S. Government**  
Report any positions held during the applicable reporting period, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature. None

	Organization (Name and Address)	Type of Organization	Position Held	From (Mo./Yr.)	To (Mo./Yr.)
Examples	Marl Ann, of Buck Collectors, NY, NY Doe Jones & Smith, Hometown, State	Non-profit education Law firm	President Partner	6/92 7/85	Present 1/00
1					
2					
3					
4					
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6					

**Part II: Compensation in Excess of \$5,000 Paid by One Source**  
Report sources of more than \$5,000 compensation received by you or your business affiliation for services provided directly by you during any one year of the reporting period. This includes the names of clients and customers of any corporation, firm, partnership, or other business enterprise, or any other non-profit organization when you directly provided the services generating a fee or payment of more than \$5,000. You need not report the U.S. Government as a source. Do not complete this part if you are an Incumbent, Termination Filter, or Vice Presidential or Presidential Candidate. None

	Source (Name and Address)	Brief Description of Duties
Examples	Doe Jones & Smith, Hometown, State Metro University (client of Doe Jones & Smith), Moneytown, State	Legal services Legal services in connection with university construction
1	Saint-Gobain Ceramics & Plastics, Inc. (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings
2	Scoggin Capital Management (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings
3	Southwest Compact Construction (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings
4	Southern Company (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings
5	Stonewall Insurance Company (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings
6	Tyson Foods, Inc. (Sidley Austin LLP client)	Legal advice in connection with judicial proceedings

Prior Editions Cannot Be Used.

OGE Ethics Annual Report 10-2 (1/18/02)



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1501 K STREET, N.W.  
WASHINGTON, D.C. 20005  
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(202) 736 8711 FAX

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March 15, 2011

The Honorable Patrick Leahy  
Chairman  
United States Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

The Honorable Charles Grassley  
Ranking Member  
United State Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Re: Nomination of Virginia A. Seitz

Dear Chairman Leahy and ranking Member Grassley:

When I submitted responses to the Judiciary Committee's questionnaire, I indicated that I was unable to locate one speech – the eulogy I delivered at my father's funeral. Last week, engaged in the sad task of cleaning out our family home after my mother's recent death, I located a copy of the eulogy. It is attached to this letter. I would be grateful if you would consider it a supplement to the materials I have already provided to the Committee.

Sincerely,

Virginia A. Seitz

VAS/ksw  
Enclosure

Eulogy for Collins J. Seitz

Just out of law school, working for the Migrant Legal Action Program in Washington, I arrived home for the weekend with a draft of a brief I had written, full of elaborate phraseology and complex explanations. I showed it to my dad. He read it and looked at me with a familiar half-smile: "Well done, Muffy. May I offer some advice?" "Sure, Dad." He looked at me; I waited for profundity. He said, "Simple, declarative sentences." In love and respect for my father, I offer to all of you who loved and respected him, these simple declarative sentences:

He helped to support his mother and siblings after the untimely death of his father.

He worked his way through college and law school, literally going hungry to pursue his education.

He became a judge without peer.

He ordered the University of Delaware to admit students without regard to their race.

He held that Delaware's segregated schools provided an unequal education to black students and ordered immediate desegregation.

He issued decisions promptly and streamlined court procedures because he knew that timely decisions were necessary to substantive justice.

He gave his time, mind, devotion, and support to charitable and educational

institutions.

He passed every test of professional courage and integrity so easily that he never understood there had been a test.

He was a brilliant judge who understood the limitations of brilliance.

He loved Margy Braxman and Maggie<sup>Callucio</sup> and everyone who worked at the courts; we grew up hearing about the wonderful performance of court personnel, the librarians who could find the origins of any phrase, and, Sally Mrvos' cheesecake.

He loved his law clerks who shared the beloved enterprise, whom he could teach and who could teach him, and who, most important of all, came to understand and appreciate what he was trying to do. We could always tell when the new clerks arrived because he would start to mumble things like "where is that in the record" and "start with a simple statement of the issue and the source of the court's jurisdiction," and at the dinner table, we would hear shocking stories about what is no longer taught in the law schools.

He loved his colleagues -- the Third Circuit Justices -- Justice Brennan and Justice Souter, who honors us with his presence today. The Third Circuit justices, he said, were the cream rising to the top of the Supreme Court. Most especially, he loved his friends on the Third Circuit -- post argument discussions, dinners at old

Bookbinders. Your intellectual fellowship and friendship meant everything to him; your praise and respect were most treasured.

He loved his family – his mother and father and brothers and, so devotedly, his sister, who shares his moral and religious commitment to social service and the public good.

He loved mom, my brothers, and me. He shared with us his love of sports, gave us the gifts of security and education that he had to struggle for, modeled the life of service and integrity that we aspire to, and gave his children a mother whose love has supported and affirmed us all of our lives.

He loved his grandchildren, even those who will be nameless who had to be bodily removed from the Devitt Award ceremony for unfortunate conduct with food items. I know his granddaughter Sally reminds him of my brother Mark, because one day when she was really ornrey, I saw him look mournfully at my brother and say “Sally, you didn’t lick it off the grass.”

We are all grateful  
 Thank you, Dad, for the legacy of honor and love, <sup>and justice,</sup> you left your family and the  
 legacy of justice and integrity that you left the Nation. <sup>and together, we</sup>  
 will ensure that dad's legacy is never lost.

Senator WHITEHOUSE. Thank you, Ms. Seitz.

Ms. O'Donnell, it is now up to you to make your introductions and statement. We welcome you.

**STATEMENT OF DENISE E. O'DONNELL, NOMINEE TO BE DIRECTOR, BUREAU OF JUSTICE ASSISTANCE, U.S. DEPARTMENT OF JUSTICE**

Ms. O'DONNELL. Thank you, Senator Whitehouse. I also want to thank Senator Schumer for the very kind and generous introduction.

I am deeply grateful to share the experience today with my family. With me is my husband, Hon. John O'Donnell, a justice of the New York State Supreme Court; my son, Jack O'Donnell; and watching from home are my daughter, Maura, an AUSA in the Western District of New York; her husband, Kevin, and their beautiful 4-month-old son, David O'Donnell Corbett. Also in spirit are my parents, Ken and Shirley Malainbeiter. My father was a World War II veteran, and both were very proud Americans who taught all of us the importance of giving back and instilled the values that I have embraced throughout my life and professional career.

If I am confirmed, I am committed to do my very best and demonstrate that I am worthy of the trust of President Obama, of Attorney General Holder, and of each of you. And I thank you for having me here today to testify, and I look forward to the Committee's questions.

Thank you.

[The biographical information of Ms. O'Donnell follows.]

UNITED STATES SENATE  
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR NON-JUDICIAL NOMINEES

PUBLIC

1. **Name:** State full name (include any former names used).  
  
Denise Ellen O'Donnell  
Denise Ellen Beiter (Maiden name)
2. **Position:** State the position for which you have been nominated.  
  
Director, Bureau of Justice Assistance
3. **Address:** List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.  
  
Buffalo, New York 14202
4. **Birthplace:** State date and place of birth.  
  
1947 Buffalo, New York
5. **Education:** List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.  
  
**State University of New York at Buffalo Law School**  
September 1978 - May, 1982  
Juris Doctorate, *Summa Cum Laude* awarded in May 1982  
  
**State University of New York at Buffalo, School of Social Work**  
September 1971 - May 1973  
Master of Social Work awarded in May 1973  
  
**Canisius College, Buffalo, NY**  
September 1965 – June 1968  
Bachelor of Science awarded in June 1968
6. **Employment Record:** List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or description.

Since leaving my position with the State of New York at the end of February 2010, I have been working on a number of pro bono projects in New York State, which are included below. I am not receiving compensation for these projects, and have not been otherwise employed, during this period.

**Member, New York State Justice Task Force.** The New York State Court of Appeals established the Justice Task Force in 2009 to identify the causes of wrongful convictions, and to recommend policies and practices that will prevent wrongful convictions in New York.

Chief Judge Jonathan Lipmann  
Justice Task Force  
Davis Polk & Wardwell LLP  
450 Lexington Avenue  
New York, New York 10017  
2009 - Present

**Member, Conviction Integrity Advisory Panel, New York County District Attorney's Office.** New York County District Attorney Cyrus Vance Jr. formed the Panel in 2010 to establish high ethical standards for prosecutors and to proactively address potential causes of wrongful convictions.

District Attorney Cyrus A. Vance, Jr.  
New York County District Attorney's Office  
One Hogan Place  
New York, New York 10013  
2010 - Present

**Member, Sex Crimes Working Group.** New York City Police Department (NYPD). I am the only civilian member of the Working Group which includes four high-ranking NYPD officials appointed by Police Commissioner Raymond Kelly to study the handling of sex crimes by the Department and to make recommendations for improvements to the Police Commissioner.

Police Commissioner Raymond Kelly  
New York City Police Department  
One Police Plaza  
New York, New York 10038  
2010 - Present

**Instructor, New York State Bar Association** Continuing Legal Education Seminar, "Rethinking Litigating Forensic Evidence in New York" held in New York City in November 2010.

Richard Rifkin  
Legal Counsel, New York State Bar Association  
One Elk Street, Albany, New York 12207

**Member, Council on Criminal Justice, New York City Bar Association.** I served on the Annual Criminal Justice Retreat Planning Committee and as Moderator of a Panel Discussion on Crime Prevention in April 2010.

Harlan Levy, Chair  
Council on Criminal Justice  
Boies, Schiller & Flexner LLP  
575 Lexington Ave.  
New York, New York 1002

**Deputy Secretary for Public Safety for New York State**

Governor David A. Paterson  
Executive Chamber  
The Capital  
Albany, NY 12224  
January 2009 - February 2010

**Commissioner, New York State Division of Criminal Justice Services**

4 Tower Place  
Albany, NY 12203  
February 2007 - February 2010

During the time I served as Deputy Secretary for Public Safety and Commissioner of the Division of Criminal Justice Services, I served on the following New York State Commissions and Boards:

Chair, NYS Commission on Sentencing Reform  
2007-2009

Chair, NYS Forensic Science Commission  
2007-2010

Chair, NYS Motor Vehicle Theft and Insurance Fraud Board  
2007-2010

Chair, NYS Re-Entry Task Force  
2007-2010

Chair, Service Provider Advisory Council (SPAC)  
2009-2010

Co-Chair, NYS Human Trafficking Task Force  
2007-2010

Co-Chair, NYS/NYC Criminal Justice-Mental Health Working Group  
2008-2010

Chair, Violence Against Women Advisory Group  
2007-2010

Homeland Security Advisor, New York State, U.S. Department of Homeland Security  
2009-2010

State Administrator, New York State, Office of Justice Programs  
2007-2010

Member, NYS Domestic Violence Advisory Council  
2007-2010

Member, NYS Homeland Security Executive Council  
2007-2010

Member, NYS Preparedness Steering Committee  
2007-2010

Member, NY NJ Joint Terrorism Task Force  
Executive Committee  
2009-2010

**Partner, Litigation Practice Group**

**Hodgson Russ LLP**

The Guaranty Building  
140 Pearl Street  
Buffalo, NY 14202  
June 2001 – January 2007

**United States Attorney, Western District of New York 1997–2001**

First Assistant United States Attorney 1993 –1997  
Assistant United States Attorney 1985-1993  
United States Attorney's Office  
Western District of New York  
138 Delaware Avenue  
Buffalo, New York 14202

**Part time Instructor, Trial Advocacy Program**

**State University of New York at Buffalo, School of Law**

John Lord O'Brian Hall, Amherst, NY 14260  
1988 - 1997

**Law Clerk to Honorable M. Dolores Denman (Deceased)**

New York State Appellate Division, Fourth Department  
50 Delaware Avenue  
Buffalo, New York 14203  
1982 - 1985

**Part Time Legal Assistant to Plaintiffs, NAACP, and Citizens Council on Human Relations in the Buffalo School Desegregation Case**  
Moot & Sprague Law Firm (Since Dissolved)  
298 Main Street  
Buffalo, New York 14202  
1978-1980

**Part Time Student Teacher, Research & Writing**  
**State University of New York at Buffalo Law School**  
John Lord O'Brian Hall  
Amherst, NY 14260  
1979-1980

**Social Worker**  
**West Side Counseling Center** (since closed)  
24 Grant Street  
Buffalo, New York 14222  
1977-1978

**Part Time Social Worker**  
**Child & Family Services**  
330 Delaware Avenue,  
Buffalo, New York 14202  
1976-1977

**Social Worker**  
**Catholic Charities of Buffalo**  
525 Washington Street  
Buffalo, New York  
1971; 1973-1974

**Caseworker**  
**New York City Department of Social Services**  
100 Lawrence Street  
Brooklyn, New York  
1968-1970

**Caseworker**  
**Erie County Department of Social Services**  
210 Pearl Street  
Buffalo, New York 14203  
6/68-9/68

**Other Not-For-Profit Uncompensated Positions**

**Director, University at Buffalo Foundation**  
P.O. Box 900  
Amherst, New York 14226  
6/2007-6/2010

**Director, National Association of Former US Attorneys**  
5300 Memorial, Suite 1000  
Houston, Texas 77007  
2003-2009

**President and Director, SUNY Buffalo Law School Alumni Association**  
John Lord O'Brian Hall  
Amherst, NY 14260  
1995-2005

**Director, National Women's Hall of Fame**  
76 Falls Street  
Seneca Falls, New York 13148  
2002-2007

**Treasurer and Director, Bar Association of Erie County**  
438 Main Street,  
Buffalo, New York 14202  
1992-1994

**Director, Women's Bar Association of State of New York,  
Western NY Chapter**  
P.O. Box 1012, Buffalo, New York .14201-1012  
1991-1992

**Director, Buffalo Seminary**  
205 Bidwell Parkway  
Buffalo, New York 14222  
1993-1995

**Director, National Conference for Community and Justice (Current name:  
National Federation for Just Communities)**  
360 Delaware Avenue, Suite 106.  
Buffalo, New York 14202  
1997-2000

7. **Military Service and Draft Status:** Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

I was not required to register for selective service and have not served in the U.S. Military.

8. **Honors and Awards:** List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

**Honorary Degree**

**Honorary Doctor of Humane Letters Degree** Awarded by  
The College of Saint Rose, Albany, New York 2007

**Academic Awards**

**John N. Bennett Award For Excellence**  
State University of New York at Buffalo Law School, May 1982  
Awarded to the member of the graduating class who exemplifies the highest standards of the profession by virtue of scholastic achievement, leadership and dedication to the ideals of the law.

**Henry Box Award**  
State University of New York at Buffalo Law School, 1980  
Awarded to second year law student for outstanding academic Achievement.

**Robert J Connelly Award For Excellence in Trial Technique**  
State University of New York at Buffalo Law School, December 1981  
Awarded by Western New York Trial Lawyers Association for excellence in trial practice.

**Honors Convocation Awards**  
State University of New York at Buffalo Law School,  
Award for highest grade in Criminal Procedure, 1981  
Award for highest grade in Contracts, 1979

**Honor Society Membership**

**Buffalo Law Review** 1979-1981

**Professional Honors and Awards**

**2009 Award for Excellence in Public Service**  
Awarded by the New York State Bar Association  
New York, New York, January 2009

**Lifetime Achievement Award**  
Awarded by National Center for Women and Policing  
Saratoga Springs, New York, September 2009

**Innovation in Law Enforcement Award**

Awarded by New York State Comptroller  
Syracuse, New York, August 2009

**Woman of Achievement Award**

Awarded by the Eleanor Roosevelt Legacy Committee  
Albany, New York, February 2009

**Women of Influence Award**

Awarded by Business First  
Buffalo, New York, September 2009

**Distinguished Alumni Award**

Awarded by Canisius College  
Buffalo, New York, November 2008

**Outstanding Service Award**

Awarded by New York State District Attorney's Association  
Saratoga Springs, New York, August 2008

**Alumnus of the Year Award**

Awarded by State University of New York at Buffalo Law School  
Buffalo, New York, April 2008

**2006 President's Award**

Awarded by The Women's Bar Association of the State of New York,  
Western New York Chapter  
Buffalo, New York, September 2006

**Distinguished Alumni Award**

Awarded by the Buffalo Law Review  
Buffalo, New York, April 2006

**Ruth G. Shapiro Award**

Awarded by the New York State Bar Association  
New York, New York, January 2005

**Inducted into the Western New York Women's Hall of Fame**

Buffalo, New York, March 2003

**Women in the Courts Award**

Awarded by the Eighth Judicial District  
Buffalo, New York, February 2000

**Liberty Bell Award**

Awarded by the Bar Association of Erie County  
Buffalo, New York, April 1999

**22<sup>nd</sup> Law Enforcement Community Award**

Awarded by the Rochester Safety Council for Project Exile Program  
Rochester, New York June 1999

**Director's Award**

Awarded by Executive Office for U.S. Attorneys  
Washington, D.C., September 1997

**Special Achievement Award**

Awarded by Executive Office for U.S. Attorneys for outstanding contributions  
as a team leader in the Evaluation and Review Program.  
Washington D.C., May, 1996

**Criminal Justice Award**

Awarded by the Bar Association of Erie County  
Buffalo, New York, April 1995

9. **Bar Associations:** List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

**Memberships in Bar Associations:**

**New York City Bar Association,**  
Member, Criminal Justice Council  
2009-Present

**New York State Bar Association**  
Member, Criminal Justice Section  
2000- Present

**Women's Bar Association of State of New York,**  
Member 1985-Present; Director,  
Western New York Chapter 1991-1992

**Bar Association of Erie County**  
Member 1984-2009  
Treasurer and Director 1992-1994

**Greater Rochester Association of Women Attorneys**  
1997-2001

**Western New York Trial Lawyers Association**  
1996-2001

**Memberships in Legal or Judicial-Related Committees**

**New York State Justice Task Force**  
New York Court of Appeals  
2009 - Present

**Conviction Integrity Advisory Panel**  
**New York County District Attorney's Office**  
2010 - Present

**Sex Crimes Working Group**  
**New York City Police Department**  
2010 – Present

**Second Circuit Committee on Racial Ethnic and Gender  
Fairness in the Courts**  
1996-1997

**Volunteer Lawyers Project**  
Buffalo, New York  
1997-2001

**Citizens Crime Commission**  
New York, New York  
2010-Present

**New York State Commission on Sentencing Reform**  
Chair, 2007-2009

**New York State Forensic Science Commission**  
Chair, 2007-2010

**New York State Motor Vehicle Theft and Insurance Fraud Board**  
Chair, 2007-2010

**New York State Re-Entry Task Force**  
Chair, 2007-2010

**New York State Service Provider Advisory Council (SPAC)**  
Chair, 2009-2010

**New York State Human Trafficking Task Force**  
Co-Chair, 2007-2010

**New York State/New York City Criminal Justice-Mental  
Health Working Group**  
Co-Chair, 2008-2010

**New York State Violence Against Women Advisory Group**  
Chair, 2007-2010

**Homeland Security Advisor, New York State, U. S. Department of Homeland  
Security**  
2009-2010

**State Administrator, New York State, Office of Justice Programs**  
2007-2010

**New York State Domestic Violence Advisory Council**  
2007-2010

**New York State Homeland Security Executive Council**  
2007-2010

**New York State Preparedness Steering Committee**  
2007-2010

**New York/ New Jersey Joint Terrorism Task Force**  
Executive Committee, 2009-2010

**Buffalo Weed & Seed Program**  
Chair, Executive Committee 1997-2001

**Project Exile Advisory Board,**  
Rochester New York  
1997-2001

**Mayor's Council on Criminal Justice**  
Rochester, New York  
1998-2001

**Membership on Judicial Selection Panels**

**Rochester Magistrate Judge Selection Committee**  
U.S. District Court, Western District of New York, 1998

**Buffalo Magistrate Judge Reappointment Committee**  
U.S. District Court, Western District of New York 1998

**Judicial Selection Committee, Senator Charles Schumer**  
2002-2005

**10. Bar and Court Admission:**

- a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

I was admitted to the bar of the State of New York in 1983.

I have had no lapses in membership since admission.

- b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

I am admitted to practice in the following Courts:

**State of New York, Fourth Judicial Department**  
February 15, 1983- Present

**United States District Court, Western District Of New York**  
November 12, 1985- Present

**United States Court of Appeals for the Second Circuit**  
June 4, 1986- Present

**United States District Court, Eastern District of New York**  
September 7, 2001- Present

**United States District Court, Southern District of New York**  
September 7, 2001- Present

**United States District Court, Northern District of New York**  
August 24, 2001-Present

**Supreme Court of the United States**  
September 6, 2002-Present

There have been no lapses in my membership to any of these courts.

11. **Memberships:**

- a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

In addition to those listed in response to Questions 9 and 10, I have been a member of the following organizations and groups since graduation from law school:

**University at Buffalo Foundation**

Director, 2007-2010

**National Association of Former US Attorneys**

Member 2001- Present; Director, 2003-2009

**SUNY Buffalo Law School Alumni Association**

Member 1995-Present; President and Director, 1995-2005

**National Women's Hall of Fame**

Member, 1985-Present; Director 2005-2007

**Buffalo Seminary Board of Directors**

Director, 1993-1995

**National Conference for Community and Justice (Current name: National Federation for Just Communities)**

Director, 1997-2001

**Housing Opportunities Made Equal**

Buffalo, New York (Membership Organization)

1990 (estimated)-Present

**WBFO Public Radio (Membership Organization)**

2000 (estimated)-Present

**WNED Public Television (Membership Organization)**

1983-1999 (estimated)

**West Side Rowing Club**

Buffalo, New York

1996-2001

**Eric Community College**

Criminal Justice Program Advisory Board,

1998-2001

**New York State District Attorney's Association**

1997-2010

**New York State Association of Chiefs of Police**

1997-2010

**New York State Sheriffs Association**

1997-2010

**NAACP (Membership Organization)**  
1995-Present

**National Organization for Women (Membership Organization)**  
2006-Present

**Western New York Women's Group (Informal Social Networking Group)**  
1998-Present

**Buffalo Canoe Club (Family membership)**  
2000-Present

**Martin House Restoration Corporation (Membership Organization)**  
2007-Present

**Eleanor Roosevelt Legacy Committee (Membership Organization)**  
2005-2009

**Irish Cultural Society**  
Buffalo, New York  
1989- 1998

- b. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

I do not believe any of the above organizations discriminate on the basis of race, sex, religion, or national origin.

**12. Published Writings and Public Statements:**

- a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

I have done my best to identify all books articles, reports, letters to the editor, editorials and other published material, including conducting a through a review of my personal files and searches of publicly available electronic databases. Despite my searches, there may be other items, I have been unable to identify, find or remember. I have located the publications listed below which are attached as Appendix 12a.

**PUBLICATIONS/ARTICLES**

“All Crimes DNA”  
DCJS Website  
June 2007

“DNA Expansion: Response to NYCLU”  
The Times Union  
June 2007

“DNA Expansion”  
Buffalo News  
June 2007

“The Division Of Criminal Justice Services”  
The Docket  
July 2007

“Re-Entry”  
Rochester Democrat & Chronicle  
July 2007

“New York’s New Human Trafficking Law”  
New York Law Journal  
November 2007

“DNA Expansion”  
Post Standard  
January 2008

“Re-Entry”  
No Known Publication  
February 2008

“Anniversary Of Death Of Edward Byrne”  
US State News  
February 2008

“Operation Impact”  
Rochester Democrat & Chronicle  
December 2008

“Economic Recovery, Crime Prevention Go Hand In Hand”  
Buffalo News  
December 2008

“Drug Law Reform”  
El Dario  
January 2009

“Priorities of DCJS”  
New York Prosecutors Training Institute Newsletter  
April 2009

“Sentencing Loophole”  
New York Law Journal  
November 2009

“Combatting Domestic Violence In New York”  
No known publication  
January 2010

“Partial Match DNA”  
Newsday  
February 2010

“Ex-Commish: I Quit Over Lost Trust”  
New York Post  
March 2010

“Assault Weapons Ban”  
Buffalo News  
September 2004

**LETTERS TO THE EDITOR**

“Internet Crimes Against Children”  
Utica Observer & Dispatch  
March 2007

“DNA Expansion”  
Rochester Democrat & Chronicle  
April 2007

“DNA Expansion”  
Buffalo News  
June 2007

“Partial Match DNA”  
Syracuse Gazette  
June 2009

“Re-Entry”  
Albany Times Union  
June 2009

“Peace Officers”  
Auburn Citizen  
August 2009

“Human Trafficking”  
No known publication  
September 2009

- b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If

you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

I have done my best to identify all reports, memoranda, and policy statements, I have prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization, including conducting a through a review of my personal files and searches of publicly available electronic databases. Despite my searches, there may be other items, I have been unable to identify, find or remember. I have located the items listed below which are attached as Appendix 12b.

DCJS Domestic Violence And Sexual Assault Reports 2006-2010

DCJS Drug Law Reform Reports 2006-2010

DCJS Hate Crimes Reports 2006-2010

Final Report: New York State Commission On Sentencing Reform  
January 2009

Preliminary Report : New York State Commission On Sentencing Reform  
October 2007

New York State/ New York City Mental Health Criminal Justice Panel Report  
and Recommendations July 2008

Report Of The Interagency Task Force On Human Trafficking August 2008

Three Year Comprehensive State Plan For Juvenile Justice And Delinquency  
Prevention Formula Grant Program 2009-2011

Annual Report: New York State Law Enforcement Accreditation Program 2009

Byrne Justice Assistance Grant Annual Report: 2007-2008

DCJS Operation Impact Annual Reports 2006-2009

DCJS Annual Performance Reports 2007-2009

Crime In New York State : Annual Reports 2006-2009

Sex Offender Management and Treatment Act: The First Year 2007

Transitional Employment Re-Entry Program February 2010

Report Of Commission On Sentencing Reform February 2009

Preliminary Report Of Commission On Sentencing Reform October 2007

Regulations On Partial Match DNA June 2009

Domestic Homicide Report September 2009

FBI Crime Statistics For 2007 September 2008

Impact Of Proposed Cuts In Byrne Grants (Undated)

Internet Safety November 2007

County Re-Entry Task Forces October 2007

Byrne Stimulus Funding (Undated)

New York Human Trafficking Law November, 2007

Domestic Incident Report Repository November 2009

Drug Market Intervention Program November, 2009

New Regulations For DNA December 2009

Drop in Crime in New York June 2007

Report Of The New York State Hate Crimes Task Force August 15, 2009

- c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

I have done my best to identify all copies of testimony, official statements and other communications relating, in whole or in part, to matters of public policy or legal interpretation, that I have issued or provided or that others presented on my behalf to public bodies or public officials, including conducting a thorough review of my personal files and searches of publicly available electronic databases. Despite my searches, there may be other items, I have been unable to identify, find or remember. I have located the items attached as Appendix 12c.

2010 Budget Testimony-New York State Legislature

2009 Budget Testimony-New York State Legislature

2008 Budget Testimony-New York State Legislature

2007 Budget Testimony- New York State Legislature

Testimony Before The New York State Assembly : Drug Law Reform  
December 2008

Testimony Before The New York State Senate Regarding Parole Release of Offenders January 2008

Statement Before The Commission On The Advancement Of Federal Law Enforcement (Webster Commission) Undated

Statement Before The Congressional Crime Forum January 1994

Statement Before Governor's Eleventh Annual Law Enforcement Forum October 1994

- d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

I have done my best to identify all transcripts and recordings of all speeches and talks delivered by me, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions, including conducting a through a review of my personal files and searches of publicly available electronic databases. Despite my searches, there may be other items, I have been unable to identify, find or remember. I have located the items attached as Appendix 12d.

Chautauqua County Sheriff's Office Re Accreditation Ceremony  
September 28, 2007 Mayville, New York

Chief's Of Police Annual Conference  
July 14, 2009 Saratoga Springs, New York

Cirus Live Meeting  
September 4, 2008 Albany, New York

COMALERT Talking Points  
Brooklyn, New York Undated

Commissioner's Remarks, Police Officer Of The Year  
October 9, 2007 Albany, New York

Comptroller's Breakfast-New York State Fair  
August 28,2009 Syracuse, New York

Crime, Justice And The Economic Crisis  
December, 2009, New York, New York

Crime Against Revenue Program  
Undated Albany, New York

Drug Market Intervention Program  
December, 2009 New York, New York

DNA Training Conference- Opening Remarks  
June 18, 2008 Albany, New York

DNA Collection Press Conference  
December 10, 2009 Albany, New York

Drug Law Reform  
October 7, 2009 Brooklyn, New York

Drunk Driving Bill Talking Points  
August 25, 2009 Albany, New York

Domestic Violence Advisory Council  
Albany, New York February 3,2010

Emergency Management Conference  
Long Island, New York May 26, 2009

Hire Re-Entry Conference  
New York, New York November 21, 2007

Homeland Security Priorities  
Long Island, New York May 22, 2009

Human Trafficking Task Force  
Albany, New York September 5, 2007

Human Trafficking Task Force  
Albany, New York September 17, 2007

Human Trafficking Task Force  
Albany, New York October 15, 2007

Human Trafficking Task Force-Service Provider Meeting  
Albany, New York December 10, 2007

Human Trafficking Task Force  
Albany, New York December 3, 2007

Human Trafficking Task Force  
Albany, New York May 26, 2009

Impact Conference  
Albany, New York January 2009

Justice Task Force –Oversight Of Forensic Labs  
New York, New York December 3, 2009

LGBT Pride Month Celebration  
Albany, New York June 27,2008

Law Enforcement/Mental Health Crisis Response Summit  
Albany, New York June 25, 2009

Leandra's Law Press Conference  
Albany, New York December 30 ,2009

National Hire Network Conference-Juvenile Justice  
New York, New York September 9, 2009

New York National Guard Domestic Preparations Conference  
Grand Island, New York September 3, 2009

NYPD Lab Accreditation Ceremony  
New York, New York June 16, 2008

Drug Law Reform: New York State Association Of Counties  
Saratoga Springs, New York September 16, 2009

Role of DCJS: New York State Bar Association Criminal Justice Section  
New York, New York November 30, 2007

New York State Coalition Against Sexual Assault Legislative Awareness Day  
Albany, New York April 18, 2007

Office Of Prevention Of Domestic Violence Conference  
Albany, New York November 19, 2009

Parole Officer Memorial  
Albany, New York July 20 , 2009

Parole Officer Graduation  
Albany, New York August 30, 2007

Police Officer Graduation  
Buffalo, New York June 28, 2007

Police Officer Memorial  
Albany, New York May 21, 2008

Project Exile Breakfast  
Rochester, New York September 28, 2007

Re-Entry Press Conference-Fortune Society  
New York, New York December 4, 2009

Re-Entry Cure New York Conference  
Albany, New York September 18, 2007

Re-Entry Training Conference  
Saratoga Springs, New York December 10, 2009

Re-Entry Address-John Jay College Of Criminal Justice  
New York, New York May 1, 2009

Homeland Security And Domestic Preparedness  
Bronx, New York February 9, 2010

College of St. Rose Commencement Speech  
Albany, New York December 15, 2007

UB Law School Alumni Award  
Buffalo, New York March 25, 2008

New York State Citizen Preparedness Conferenc  
Albany, New York November, 2009

Women And Policing Conference  
Saratoga Springs, New York September 21, 2009

Youth Violence Reduction Conference  
Albany, New York February 4, 2008

Sheriffs' Association Annual Conference  
Lake Placid, New York August, 2009

Ruth G. Shapiro Award- New York State Bar Association Remarks  
New York, New York January 20, 2004

Law Day Address Niagara County Bar Association  
Niagara Falls, New York May 2008

Attorney General Campaign Kick-Off  
Buffalo, New York May 9, 2005

Lawyer's Committee Campaign Breakfast  
New York, New York November 30, 2005

Attorney General's Campaign  
New York City Fundraising Event  
December 8, 2006

Liberty Bell Award, Erie County Bar Association  
Buffalo, New York April, 1999

Women's Equality Day Celebration- Federal Building  
Buffalo, New York August 24, 2000

Housing Opportunities Made Equal  
Buffalo, New York April 5, 2001

Twentieth Century Club Lecture Series  
Buffalo, New York June, 1998

Amherst Central High School Commencement Address  
Amherst, New York May 18, 1999

UB Law School Commencement Speech  
Amherst, New York May 15, 1999

Settlement Of Civil Rico Case Against Laborers' Local 210  
Buffalo, New York December 2, 1999

Telemarketing Fraud  
Buffalo, New York Undated

Child Exploitation Conference  
Buffalo, New York May 19, 1999

Asset Forfeiture Conference  
Chautauqua County, New York May 26, 1999

Immigration & Naturalization Ceremony Western District Of New York  
Buffalo, New York June 4, 1998

Installation As United States Attorney  
Rochester, New York September 30, 1997

Computer Technology Conference  
Buffalo, New York May 25, 2000

Genesee County Bar Association  
Batavia, New York Undated

- e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

I have done my best to identify all clips and transcripts of interviews I have given to newspapers, magazines or other publications, or radio or television stations, including conducting a thorough review of my personal files and searches of publicly available electronic databases. Despite my searches, there may be other items, I have been unable to identify, find or remember. I have located the items attached as Appendix 12e.

TV Interview YNN Capital News 9 “Violent Video Games “  
Troy New York December 20, 2007

TV Interview Parent TV “Halloween Safety”  
New York, New York November 8, 2008

TV Interview MSNBC Countdown with Keith Olbermann  
“Abortion Violence” New York, New York June, 2009

Radio Interview: Ethics On The Air “Emerging Public Safety Issues in New  
York “ New York, New York June, 26, 2009

Radio Interview: Nevada Public Radio “ Abortion Clinic Safety”  
Albany, New York June, 2009

Press Interview: Buffalo News “ New US Attorney Comes Armed With  
Expertise” Buffalo, New York September, 1997

Press Interview: Rochester Democrat & Chronicle “City Hails ODonnell For  
Project Exile” Rochester, New York June, 2001

Press Interview: The Daily Record “O’Donnell Summons Up Experiences For  
New Role” Rochester, New York April 13, 2007

Press Interview: New York Law Journal: O’Donnell Stresses Experience to Sway  
Voters” New York, New York February 8, 2006

Press Interview: Buffalo News “Re-entry Program “  
Buffalo, New York February 4, 2010

Press Interview: The Post Standard “Syracuse Crime Analysis Center”  
Syracuse, New York February 2, 2010

Press Interview: The Targeted News Service “ Haitian Earthquake Family  
Resource Center “ New York, New York January 29, 2010

Press Interview: The New York Times “Partial match DNA Policy”  
New York, New York January 25, 2010

Press Interview: Buffalo News “Leandra’s Law”  
Buffalo, New York December 31, 2009

Press Interview: The Times Union and other Media “ Rape Kit Training Video”  
New York, New York December 30, 2009

Press Interview: Utica Daily News “ Partial Match DNA”  
Albany, New York December 14, 2009

Press Interview: The Post Standard: Domestic Violence Database”  
Saratoga Springs, New York November 18, 2009

Press Interview: The Associated Press “Closing the Parole Loophole”  
Albany, New York November 6, 2009

Press Interview: Press & Sun Bulletin “DNA Expansion”  
Albany, New York October 12, 2009

Press Interview: The Associated Press “Videotaping of Interrogations”  
Albany, New York October 10, 2009

Press Interview: The Ithaca Journal “ Domestic Violence Homicides”  
Albany, New York October 8, 2009

Press Interview: New York Beacon “ Drug Reform”  
Brooklyn, New York October 8, 2009

Press Interview: Targeted News Service “ Offender Re-entry”  
Albany, New York September 17, 2009

Press Interview: The Times Union “ Criminal Justice/Mental Health Crisis  
Intervention Teams” Albany, New York June 26, 2009

Press Interview: The New York Times “ Security Funding for Synagogues”  
New York, New York June 1, 2009

Press Interview: The Journal News “License Plate Reader Technology”  
Albany, New York May 29, 2009

Press Interview: Star Gazette “Juvenile Justice”  
Albany, New York May 11, 2009

Press Interview: New York Law Journal and other media “ Sentencing  
Commission Report” New York, New York February 4, 2009

Press Interview: The Daily record “ Public Service Award”  
New York, New York January 27, 2009

Press Interview: Buffalo News “Buffalo Crime Analysis Center”  
Buffalo, New York September 12, 2008

Press Interview: The Times Union “ Review of New York’s Sentencing Laws”  
Albany, New York November 14, 2007

Press Interview: State News Albany “Missing and Exploited Children Clearinghouse” Albany, New York December 2, 2007

Press Interview: The Times Union “Capital Profile” Albany, New York October 29, 2007

Press Interview: The Times Union “Preliminary Report of Sentencing Commission” Albany, New York November 2, 2007

Press Interview: Rochester Democrat & Chronicle “Project Exile” Albany, New York September 29, 2007

Press Interview: The Associated Press “Operation Impact” Albany, New York June 5, 2007

**13. Public Office, Political Activities and Affiliations:**

- a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

2009-2010 I was appointed New York State Deputy Secretary for Public Safety by Governor David A. Paterson.

2007-2010 I was appointed New York State Commissioner of the Division of Criminal Justice Services by Governor Eliot Spitzer and confirmed by the New York State Senate.

2005-2006 I was a candidate for New York State Attorney General. I ended my candidacy in June 2006 when another candidate was nominated for the office by the New York State Democratic Party.

1997-2001 I was nominated as United States Attorney for the Western York by President William Clinton and confirmed by the United States Senate.

- b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

**O'Donnell For New York Campaign Committee** I was a candidate for New York State Attorney General from 2005-2006. I ended the campaign when the New York State Democratic Party nominated another candidate in May 2006. I was mentioned as a candidate for New York State Attorney General and Lt. Governor in 2010 but declined to run.

**Lawyers Committee for Kathleen Rice** I was a member of the Lawyers Committee for Kathleen Rice, an unsuccessful candidate for New York State Attorney General in 2010. I co-chaired a fundraiser for the candidate in 2010.

**Spitzer 2006 Campaign Committee** I was the Homeland Security and Criminal Justice Advisor to the Spitzer 2006 Campaign for Governor of New York State. I provided policy advice during the campaign and attended events of behalf of the candidate in 2006.

**Transition Committee for Governor Elect Eliot Spitzer** I was Co-chair of the Public Safety Committee of the Spitzer Transition Committee in 2006.

**Transition Committee for Attorney General-Elect Andrew Cuomo** I was co-chair of the Ethics and Reform Committee of the Cuomo Transition Committee in 2006.

**Kerry Edwards 2004 Campaign** I was a member of Lawyers for Kerry and provided legal services on voter access issues in Florida during the 2004 Presidential election.

**Howard Dean 2004 Primary Campaign** I was an alternate delegate for Howard Dean for President in 2004. Duties consisted of collecting signatures on nominating petitions, and making telephone calls to primary voters.

**George McGovern for President Campaign** I was a volunteer for the George McGovern Presidential campaign in 1972 in Buffalo, New York. Duties consisted of organizing volunteers, canvassing, mailings and logistics.

14. **Legal Career:** Answer each part separately.

a. Describe chronologically your law practice and legal experience after graduation from law school including:

i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

After graduation from law school, I served as law clerk to the late Honorable M. Dolores Denman of the New York State Appellate Division, Fourth Department from 1982-1985.

ii. whether you practiced alone, and if so, the addresses and dates;

I was never a solo practitioner.

iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

- 2010-Present I am currently not affiliated with any law firm, company or government agency. I am working on *pro bono* projects for the Justice Task Force of the New York State Court of Appeals, the New York City Police Department, and the New York County District Attorney's Office.
- 2009-2010 **Governor David A. Paterson, State of New York,**  
Executive Chamber  
State Capital  
Albany, NY 12224
- 2007-2010 **Commissioner, New York State Division of Criminal Justice Services (DCJS)**  
4 Tower Place  
Albany, New York 12203
- 2001-2007 **Hodgson Russ, LLP**  
The Guaranty Building.  
140 Pearl St.  
Buffalo, NY 14202
- 1985-2001 **United States Attorney's Office  
For the Western District of New York**  
138 Delaware Ave.  
Buffalo, New York 14202  
United States Attorney 1997-2001,  
First Assistant United States Attorney 1993-2007  
Assistant United States Attorney 1985-1993
- 1988 – 1997 **Part time Instructor, Trial Advocacy Program  
State University of New York at Buffalo, School of Law**  
John Lord O'Brian Hall  
Amherst, New York 14260
- 1982-1985 **Law Clerk to Honorable M. Dolores Denman (Deceased)**  
New York State Appellate Division, Fourth Department  
50 Delaware Avenue  
Buffalo, New York 14203

- 1979-1981 **Part Time Legal Assistant to Plaintiffs, NAACP, and Citizens Council on Human Relations for the Buffalo School Desegregation Case**  
**Moot & Sprague Law Firm** (now dissolved)  
 298 Main Street  
 Buffalo, New York 14202
- 1979 - 1980 **Part Time Student Teacher, Research & Writing State University of New York at Buffalo Law School**  
 John Lord O'Brian Hall  
 Amherst, New York 14260
- 1977-1978 **Social Worker**  
**West Side Counseling Center** (since closed)  
 24 Grant Street  
 Buffalo, New York 14222
- 1976-1977 **Part Time Social Worker –Emergency Services Child & Family Services**  
 330 Delaware Avenue,  
 Buffalo, New York 14202
- 1973-1974 **Social Worker**  
 1971 **Catholic Charities of Buffalo**  
 525 Washington Street  
 Buffalo, New York 14202
- 1968-1970 **Caseworker**  
**New York City Department of Social Services**  
 100 Lawrence Street  
 Brooklyn, New York
- 1968 **Caseworker**  
**Erie County Department of Social Services**  
 210 Pearl Street  
 Buffalo, New York 14203

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have never served as a mediator or arbitrator.

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

I have had a rich and rewarding legal career as a law clerk, federal prosecutor, United States Attorney, partner with a respected law firm, state agency commissioner, and administrator and criminal justice policy advisor to two New York State Governors.

After graduating from law school in 1983, my first legal position was a clerkship for a highly respected Appellate Division Judge, M. Dolores Denman, of the New York State Appellate Division with whom I had the opportunity to work on a variety of civil and criminal cases, hear oral arguments, and develop strong research and writing skills.

Upon completion of the clerkship in 1985, I was hired by the United States Attorney's Office for the Western District of New York, and was fortunate to have had a challenging and rewarding sixteen-year career in that office, rising through the ranks from an Assistant United States Attorney to be nominated by the President, and confirmed by the United States Senate, as the United States Attorney.

As an Assistant United States Attorney from 1985 through 1990, I handled a variety of Federal criminal and civil cases. My criminal practice focused primarily on white-collar crime and public corruption cases. During my first several years in the office, I also handled civil cases including tort, administrative law, federal program fraud, immigration, bankruptcy, and asset forfeiture cases. I was Chief of Appeals from 1990-1993 and was the Professional Responsibility Officer for the office for a number of years. I also served as a Team Leader for the Evaluation and Review Staff (EARS) of the Executive Office for United States Attorneys, which evaluated performance of the U.S. Attorneys Offices. I served as First Assistant United States Attorney from 1993 through 1997.

As United States Attorney from 1997 through 2001, I oversaw all civil and criminal litigation in which the United States was a party for the seventeen counties in the Western District of New York. I also served as Vice Chair of the Attorney General's Advisory Committee (AGAC), which advises the Attorney General on policy matters affecting the Department of Justice, and as a member of the Investigations & Intelligence, Northern Border and Civil Rights Subcommittees of the AGAC.

In 2001, I joined the law firm of Hodgson Russ LLP, one of New York State's oldest law firms as a Partner in the Litigation Practice Group. From 2001 through 2007, I concentrated my legal practice on white-collar defense, health care law, civil fraud and false claims act litigation, and corporate ethics and compliance.

I was an unsuccessful candidate for New York State Attorney General in 2005-2006 and, after ending my campaign in June 2006, served as a Criminal Justice and Homeland Security Advisor to the Spitzer 2006 campaign for New York State Governor.

I left private practice in 2007, and joined the administration of New York Governor Eliot Spitzer. From January 2007 through March 2010, I served as Commissioner of the New York State Division of Criminal Justice Services (DCJS). At DCJS, I was responsible for administration of a \$64 million operating budget, \$86 million in local assistance funding and \$67 million in Federal Criminal Justice Stimulus funding. As Commissioner, I oversaw a multi-service criminal justice agency with responsibility for a number of programs including the Office of Legal Counsel and Legislative Affairs, federal and state grant administration, law enforcement training and accreditation, oversight and accreditation of forensic laboratories, the DNA Databank, the Sex Offender Registry, criminal justice technology projects, crime analysis centers, state and local re-entry task forces, juvenile justice programs, fingerprint and criminal history background checks, criminal justice research and statistics, and drug law reform.

In January 2009, I was appointed by Governor David A. Paterson as Deputy Secretary for Public Safety, a position I held along with the position of Commissioner of DCJS until March 2010. As Deputy Secretary to the Governor, I was responsible for a portfolio of twelve public safety agencies with a combined annual budget of \$4.7 billion and a workforce of 42,000 employees, comprising 19 percent of the state workforce. My duties also included serving as Homeland Security Advisor for New York State with the Department of Homeland Security.

Since leaving State Government in March 2010, I have been involved in several *pro bono* projects to improve the criminal justice system and prevent wrongful convictions, and have been working on various bar association seminars and public safety projects in New York State.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

During my sixteen-year career in the United States Attorney's Office, I was very privileged to represent the people of the United States in a number of criminal investigations, along with Federal, State, and local law enforcement officers, including in some significant national and international cases. I also worked closely with crime victims and crime victim organizations.

While in private practice, I represented a variety of individual, corporate, government and not-for-profit clients in civil and criminal matters. I also represented several clients in federal false claims act cases.

During my years in State Government, I supervised a Legal Department that handled civil defensive cases against New York State and advised the Governor and the Governor's Counsel on class action litigation involving the State of New York.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

- i. Indicate the percentage of your practice in:
  1. federal courts;
  2. state courts of record;
  3. other courts;
  4. administrative agencies

During my 16 years in the United States Attorney's Office, I appeared in federal court on almost a daily basis as an Assistant United States Attorney, and occasionally as First Assistant and United States Attorney. Approximately 95% of my practice was in federal court, and 5% was in state court.

During my five years in private practice, I appeared in both federal and state court occasionally. Approximately 40% of my practice was in federal courts, 40% in state courts and 20 % in arbitrations.

During my years in New York State Government, I did not handle litigation directly but supervised litigation, drafted legislation, researched legal issues and reviewed legal memoranda and briefs. The vast majority of my practice (95%) involved civil and administrative matters before state courts and administrative bodies, and 5% was before federal courts.

- ii. Indicate the percentage of your practice in:
  - 1) civil proceedings;
  - 2) criminal proceedings.

During my time in the United States Attorney's Office, approximately 80% of my practice was criminal and 20% was civil.

During my time in private practice, approximately 30% of my practice was criminal and 70% was civil.

During my time in New York State Government, approximately 95% of my practice was civil and 5% was criminal.

d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

## i. What percentage of these trials were:

- 1) jury;
- 2) non-jury

During my time in the U.S. Attorney's Office, I tried approximately 15 jury cases to verdict as sole counsel or chief counsel and handled hundreds of grand jury proceedings, pre-trial hearings, pleas and civil depositions. I do not recall trying any non-jury cases.

During my time in private practice, I tried two arbitration cases. I also handled a variety of civil motions, depositions, oral arguments and appeals.

I did not directly handle litigation during my time in state government. I did supervise litigation.

- e. Describe your practice, if any, before the Supreme Court of the United States. Supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

I have not practiced before the Supreme Court of the United States.

15. **Litigation:** Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- a. the date of representation;
- b. the name of the court and the name of the judge or judges before whom the case was litigated; and
- c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

**U.S. ex rel. Cirrincione v. Larry D. Tingley, et al.; U.S. ex rel. Cirrincione v. Thomas Hamel, et al. 98-CV-1929 (TJM) (DEP) and 99 CV 2082 (TJM)(DEP)**

This was a Federal False Claims Act case against the State of New York, the City of New York and four local school districts. I was counsel for one of the named local school districts, Elmira City School District, and represented the school district in a civil whistleblower lawsuit and investigation by the Civil Division of the United States Department of Justice and the United

States Attorney's Office for the Northern District of New York from 2001 through 2006. The investigation required extensive document production by my client. The investigation focused on alleged improper Medicare billings by the school district for speech therapy and transportation charges for students and resulted in a civil settlement and payment of damages of \$540 million by the State of New York and New York City. The case was resolved in a civil settlement in the U.S. District Court in the Northern District of New York. My client, Elmira City School District was not held individually responsible. The case was reported by the Department of Justice to be the largest civil settlement for false claims to the Medicaid Program.

Judge: Honorable Thomas J. McAvoy  
U.S. District Court, Northern District of New York

Opposing Counsel: Carol Wallack,  
Trial Attorney, US DOJ Civil Division  
Commercial Litigation Branch  
501 D Street NW  
Washington DC 20530  
Tel. 202-616-0345

**U.S. ex rel Ho v. Korreect Optical, United States District Court, Western District of New York, Docket No: 03-CV-0073-S (F)**

This was a False Claims Act case against Korreect Optical of Louisville, Kentucky, an eyeglass manufacturer that provided eyeglasses to veterans and other government entities under federal government contracts. The complaint, filed in 2003, alleged that Korreect Optical had violated Veterans Administration (VA) regulations by routinely submitting claims to the VA seeking reimbursement for false claims through ophthalmic prescriptions for VA eyewear. The complaint alleged the claims were false due to the inclusion of false certifications, unprescribed add-ons, non-rendered services including UV and scratch coating, product substitution and also the involvement of unlicensed dispensers. I was principal counsel for the relators, and conducted the investigation and filed the complaint substantiating extensive false claims by Korreect Optical. The United States intervened in the case, and the case was settled for \$3.5 million dollars.

Judge: Honorable William M. Skretny  
U.S. District Court  
Western District of New York

Counsel for the United States: AUSA Robert Trusiak  
U.S. Attorney's Office  
Western District of New York  
138 Delaware Avenue  
Buffalo, New York 14203  
Tel. 716-843-5700

Opposing Counsel: Rodney Personius  
2100 Main Place Tower  
Buffalo, NY 14202  
Tel: 716-855-1050

**United States v. Stan Barre, Eastern District of Louisiana , Docket No:-05-CR-00186-CJB-SS2**

From 2004 through 2006, I was chief counsel for a corporate business partner and witness against Stan Barre, a former police officer and New Orleans businessman, who was indicted in June, 2005 for accepting tens of thousands of dollars in kickbacks from a city contractor in a significant public corruption probe by the United States Attorney's Office in the Eastern District of Louisiana. The defendant pled guilty and was sentenced to five years imprisonment.

Judge: Honorable Carl Barbier  
U.S. District Court  
Eastern District of Louisiana

Opposing Counsel: First Assistant United States Attorney Jan Mann,  
U.S. Attorney's Office  
Eastern District of Louisiana  
500 Poydras Street  
Room 210B,  
New Orleans, LA 70130  
Tel. 504-680-3000

**New York v. Hallmark Nursing Centre, Schenectady County Court, Schenectady, New York, Index No: AG-1101-1**

I represented a corporate defendant, Hallmark Nursing Centre in a criminal investigation by the New York State Attorney General's Office. The corporation was criminally charged with patient negligence and abuse. In 2003, the corporation pled guilty and agreed to pay a fine and restitution of \$1 million dollars, and to enter into a corporate compliance agreement with the New York State Health Department.

Opposing Counsel: William Comisky (former Chief, Medicaid Fraud  
Control Unit,)New York State Attorney General's Office  
Current Address: Partner, Hodgson Russ LLP  
677 Broadway Street  
Albany, New York 12207  
Tel. 518-433-2428

**US v Giles, et al, 93-CR-238A/93-CR-255A, 93CR-81A**  
**U.S. District Court, Western District of New York**

From 1992 through 1994, I was the chief prosecutor in a significant public corruption prosecution of Niagara County public officials for accepting bribes and gratuities from vendors supplying food to the Niagara County Jail. Defendants, including the Niagara County Sherriff, Deputy Sherriff, Chief Jailor and three other defendants who pled guilty and were sentenced to substantial fines and/or periods of incarceration.

Judge: Honorable Richard J. Arcara  
 U.S. District Court  
 Western District of New York

Opposing Counsel: Terrence Connors  
 1020 Liberty Building,  
 Buffalo, New York 14202  
 Tel. 716-852-5533

Joel Daniels  
 107 Delaware Avenue # 1366  
 Buffalo, New York 14202  
 Tel: 716- 856-5140

John F Humann  
 298 Main Street Suite 402,  
 Buffalo, New York 14202  
 Tel. 716-551-3341

**US v Laborer's Local 210, Civil Docket #: 1:99-CV-00915-RJA, U.S. District Court,**  
**Western District of New York**

From 1999 through 2000, I was co-counsel with the U.S. Department of Justice Organized Crime Section representing the United States in a civil RICO case against a local union in the Western District of New York. The case was part of a five-year long effort by the Department of Justice to rid the Laborers International Union of North America of the influence of organized crime. The action alleged that the influence of organized crime over the local union for a period of more than twenty years was so pervasive, long-standing, and substantial that the appointment of a court monitor was necessary to restore democracy to the union and put an end to the influence and control of organized crime. The case resulted in a Consent Degree and appointment of a Court Appointed Monitor in January 2000 to oversee the union.

Judge: Honorable Richard J. Arcara  
 U.S. District Court, Western District of New York  
 68 Court Street  
 Buffalo, New York 14202  
 Tel. 716-551-5626

Monitor: John McDonald  
 Director of Security  
 Erie Community College  
 21 Ellicott St, Buffalo, New York 14203  
 Tel: 716-634-0800

Opposing Counsel: Honorable John Curran  
 NYS Supreme Court  
 92 Franklin Street  
 Buffalo, New York 14202  
 Tel: 716-845-9471

**United States v. Donald Jacobs, 93-CR-173-S, Court of Appeals**  
**Docket No. 961341, U.S. District Court, Western District of New York**

Along with co-counsel, I prosecuted the defendant for participation in a nationwide Mexican Bank Draft scheme promulgated by the anti-government Patriot Movement for the purpose of destroying the United States monetary system. Three co-defendants pled guilty prior to trial. Jacobs was found guilty on multiple counts of bank fraud after a six-week jury trial for participation in the fraudulent scheme that resulted in a six million dollar financial loss.

Judge: Honorable William M. Skretny  
 U.S. District Court, Western District of New York

Opposing Counsel: Kimberly Schechter  
 298 Main Street  
 Buffalo, New York 14202  
 Tel. 716-551-3341

Herbert Greenman  
 42 Delaware Avenue  
 Buffalo, New York 14202  
 Tel. 716-849-1333

**United States ex rel Grasty v. LTV/Sierra Research Division, 90-CR-124-E; 90 CV-1063-S,**  
**U.S. District Court, Western District of New York**

I was sole prosecutor in the criminal prosecution of LTV/Sierra Research Division in a major defense procurement fraud investigation, and served as co-counsel with a trial attorney from the Department of Justice Civil Fraud Section in a related False Claims Act case. LTV/Sierra Research Division admitted, as part of a criminal plea, to obtaining confidential information related to the U.S. Air Force Anti Radiation Missile (ARM) Decoy Program to gain an advantage in bidding on government contracts. The case was resolved in a Global Settlement in 1990 that resulted in payment of \$1.5 million to the United States.

Judge: Honorable John T. Elfvin (deceased)  
 U.S. District Court, Western District of New York

Opposing Counsel: Joseph V. Sedita  
Hodgson Russ LLP  
The Guaranty Building  
140 Pearl Street  
Buffalo, NY 14202  
Tel: 716.848.1383

Michael Schieninger  
1900 K Street  
Washington D.C. 20006  
Tel. 202-496-7570

**United States v. Gleave and Knoll, 90 Cr-33-S, 786 F. Supp 258 (WDNY, 1992) U.S. District Court, Western District of New York; Court of Appeals Docket Nos. 92-1580; 92-1586; 95-1267, 16 F.3d 1313 (2d Cir. 1994).**

This was a complex bankruptcy fraud prosecution of an attorney and businessman. Lengthy suppression hearings were held over a two-year period, during which I presented testimony from more than twenty witnesses at pre-trial hearings. Following a three-month jury trial, the defendants were convicted of bankruptcy fraud and making false statements to the bankruptcy court, but acquitted of other charges. On appeal, the case was remanded for further proceedings on Fourth Amendment grounds. Following a post-trial evidentiary hearing, the case was re-argued before the Second Circuit and was affirmed in 1996. I was sole counsel during the suppression hearings, trial, post trial and Second Circuit appeals.

Judge: Honorable William M. Skretny  
U.S. District Court, Western District of New York

Opposing Counsel: Terrence M. Connors  
1020 Liberty Building  
Buffalo, New York 14202  
Tel. 716-852-5533

Thomas P. Cleary (deceased)  
120 Delaware Avenue  
Buffalo, New York 14202  
Tel. 716-847-6760

Steven Braga  
Miller, Cassidy, Larroca & Lewin  
255 M Street, N.W.  
Washington D.C. 20037  
Tel: 202-293-6400

**United States v Steve John Washuta, 93-Cr-109-S, U.S. District Court, Western District of New York**

I was the sole prosecutor in this significant RICO public corruption case that resulted in the defendant pleading guilty to operating a sanitary landfill as a criminal enterprise for the payment of bribes to public officials. During the undercover investigation, the defendant was videotaped paying \$100,000 in bribes to a public official. After lengthy pre-trial proceedings, including one of the first legal challenges to the expanded use of the RICO statute to prosecute public corruption, the defendant pled guilty and was required to pay the sum of \$1.2 million to the United States. Because of his seriously declining physical condition, the defendant was sentenced to home confinement.

Judge:                   Honorable William M. Skretny  
                                  U.S. District Court  
                                  Western District of New York

Opposing Counsel:       Terrence M. Connors  
                                  1020 Liberty Building  
                                  Buffalo, New York 14202  
                                  Tel. 716-852-5533

16. **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

I have had a rich and rewarding legal career to date, and have developed a deep understanding and appreciation for the United States criminal justice system. I believe these experiences have prepared me well to serve as Director of the Bureau of Justice Assistance (BJA), the mission of which is to support law enforcement, courts, corrections, treatment, victim services, technology, and prevention initiatives that strengthen the nation's criminal justice system and provide national leadership in criminal justice policy, training, and technical assistance to further the administration of justice.

During my career as a federal prosecutor, I have had the privilege of working closely with all levels of law enforcement nationally and internationally. Much of the experience I have developed came from handling cases of national importance in the United States Attorney's Office and from leadership and policy positions, which I held in state government. In April 1995, I supervised the Western New York investigation of Timothy McVeigh, along with the FBI Buffalo Office, following the bombing of the Alfred P. Murrah Federal Building in Oklahoma City. McVeigh's family resided in the Western District of New York and critical evidence used in his prosecution was obtained through execution of search warrants in the Western District. I personally prepared search warrants, supporting

affidavits, grand jury subpoenas, and coordinated the District's investigation with the Department of Justice, the FBI, the Courts and other U.S. Attorney Offices in the critical hours after the bombing.

I later supervised the investigation, extradition and prosecution of James Kopp, an international fugitive on the FBI's Ten Most Wanted List for the murder of Dr. Barnett Slepian in the Western District of New York. I learned valuable lessons from these cases on the need for information sharing and coordination of law enforcement resources, as well as for close collaboration between prosecutors and law enforcement.

I also worked on developing programs in the United States Attorney's Office to provide services to crime victims, combat domestic violence, fight discrimination and hate crimes, and reduce gun violence. During my time as United States Attorney, my office was one of the offices selected nationwide which participated in the Strategic Approaches To Community Safety (SACSI) Program funded by the Bureau of Justice Assistance to develop research-led community-based programs to reduce violent crime. I also developed the second Project Exile Program in the County to reduce gun violence through tough no-plea policies, close coordination with local prosecutors, development of multi-agency gun task forces, and implementation of the Boston Ceasefire model in Rochester and Buffalo. These efforts resulted in a substantial reduction in violent crime in the District.

I continued these efforts when I became Commissioner of the Division of Criminal Justice Services for New York. I worked to enhance law enforcement training and technology and to promote intelligence-driven policing. I oversaw the expansion of Operation Impact, a multi-faceted law enforcement program in the seventeen counties outside New York City with the highest volume of violent crime and set up four regional high tech crime analysis centers to share critical crime data and expand the analytical capability of law enforcement throughout the state.

New York State is one of eight States nationwide to participate in the National Institute of Corrections Transition from Prison to the Community Initiative (TPCI). As Chair of the New York State Re-entry Task Force, I coordinated efforts of state agencies to develop a statewide re-entry plan to transform the way the State transitions formerly incarcerated persons back to the community. I also oversaw the development and expansion of fourteen local county re-entry task forces around the state to build capacity at the local level.

From 2007-2009, I served as Chair of the Commission on Sentencing Reform for New York State. The Commission conducted research, heard from prominent national experts and conducted public hearings on sentencing and related criminal justice issues. It produced a Preliminary Report in 2007 and a Final Report in 2009 that made substantial recommendations for reform and simplification of New York's sentencing laws. The work of the Commission contributed to the reform of the Rockefeller Drug Laws in New York in 2009 and to subsequent policy changes in the areas of re-entry, probation and parole supervision and services to crime victims.

New York State was one of the first states to provide oversight and accreditation of its forensic laboratories (including DNA Labs) through establishment of the Forensic Science Commission (FSC). From 2007 through 2010, I served as chair of the FSC, and worked with Laboratory Directors, the Innocence Project and leading DNA scientists to continue to improve forensic science in New York. I was also instrumental in developing a rigorous

program for investigation of misconduct in forensic laboratories required as a condition of award of funds under the Coverdale Program administered by BJA.

I served as the State Administrator for funds to New York State from the Bureau of Justice Assistance from 2007 to 2010 and oversaw the annual award of \$86 million dollars in local assistance funding and \$67 million in Federal Criminal Justice Stimulus funding. I understand the importance of objectivity, transparency and fairness in the awarding of competitive grants, and appreciate first-hand the need for careful oversight and administration of grant funds.

**Lobbying Activities:** I have not engaged in any lobbying activities.

17. **Teaching:** What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

Seminar/Class	Sponsor	Place	Dates	Description
Legal Research & Writing	SUNY Buffalo Law School	Buffalo, NY	1979-1980	Student Instructor-one semester course
Trial Practice	SUNY Buffalo Law School	Buffalo, NY	1988-1997	Part time faculty-one semester course
Criminal Practice Seminar	DOJ, Office of Legal Education	Washington DC	1988-1991	Instructor-Trial Practice one week course.
Criminal Justice Act Seminar	Federal Public Defender's Office	Buffalo, New York	5/1993	Lecture on Speedy Trial Act
*Basic Federal Practice CLE	NYS Bar Association	Buffalo, NY	11/93	Lecture on Investigative Techniques
*Professional Responsibility Officers Conference	DOJ	Washington DC	10/94	Lecture on Ethical Issues in Jury Selection and Witness Preparation
Fair Housing Act Seminar	DOJ, Civil Rights Division	Clearwater, Florida	10/94	Lecture on Ethics issues for DOJ Attorneys
Evidence For Experienced Criminal Litigators	DOJ, Office of Legal Education	Phoenix, Az	9/1994	Lecture on Relevancy (FRE 401-404)
Evidence For Experienced Criminal Litigators	DOJ, Office of Legal Education	Clearwater, Florida	2/94	Lecture on Ethics for Prosecutors
Fair Housing Act Seminar	DOJ, Civil Rights	Washington DC	9/95	Lecture on Ethics issues for DOJ
Fair Housing Act Seminar	DOJ, Civil Rights Division	Washington DC 41	9/95	Lecture on Ethics issues for DOJ Attorneys

Advanced Evidence for Civil Litigators	DOJ, Office of Legal Education	Rochester, NY	7/95	Lecture on Ethical issues in collateral proceedings
Professional Responsibility Officers Conference	DOJ	Washington DC	11/95	Lecture on Search Warrants and Attorney Client Privilege
Noonday CLE Lecture	Bar Assn of Erie County	Buffalo, NY	6/96	Lecture on Professional Responsibility Issues for Prosecutors
Practical Evidence	NYS Bar Association	Buffalo, NY	11/96	Lecture on Questioning Witnesses
US Attorneys Office Management Seminar	DOJ Office of Legal Education	Columbia SC	5/97	Lecture on Working Together To Manage a US Attorneys Office
Third National Symposium on Victims of Federal Crime	EOUSA	Washington DC	1/01	Lecture on collaboration between prosecutors and victim witness coordinators
*Seminar For In House Counsel	Hodgson Russ LLP,	Buffalo, New York		Lecture on Safety in the Workplace
*Arizona State Law School	Federal Practice Seminar	Phoenix, Arizona	4/09	Lecture on Role of the U.S. Attorney
*Criminal Justice Retreat	City Bar Association	New York City	4/08	Panel Discussion on Prosecutorial Power
*Prisoner Re-Entry Institute	John Jay College of Criminal Justice	New York City	5/09	Lecture on New York State's Re-Entry Plan
*Fighting Crime in New York State	Citizens Crime Commission	New York City	1/10	Lecture on Priorities of the Division For Criminal Justice Services
* Symposium on Juvenile Justice Reform	Ethical Cultural Society	New York City	4/10	Transforming New York's Juvenile Justice System
* Criminal Justice Council	New York City Bar Association	New York City	6/10	New York State Division of Criminal Justice

* Criminal Justice Council	New York City Bar Association	New York City	6/10	New York State Division of Criminal Justice Services
*Forensic Evidence CLE	New York State Bar Association	New York City	10/10	Regulation and Oversight of Forensic Science in New York State

I have done my best to locate copies of all outlines, lecture notes and instructional materials from classes and lectures which I have conducted, including conducting a thorough review of my personal files and searches of publicly available electronic databases. Despite my searches, there may be other items I have been unable to identify, find or remember. Materials are available for the lectures and courses identified by \*, and are attached as Appendix 17.

18. **Deferred Income/ Future Benefits:** List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

New York State Retirement System Defined Benefit Plan- applied for benefits in September with estimated date of retirement in October 2010. I began receiving estimated benefits in December 2010.

Vested in Hodgson Russ Retirement Program Defined Benefit Plan- not currently receiving benefits -eligible at age 65 (benefit from former employment with Hodgson Russ LLP)

Vested in Federal Employees Retirement System and Thrift Savings Plan- not currently receiving benefits or payments (benefit from former employment with Department of Justice).

19. **Outside Commitments During Service:** Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service? If so, explain.

I have no plans, commitments, or agreements to pursue outside employment during service as Director of Bureau of Justice Assistance

20. **Sources of Income:** List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, licensing fees, honoraria, and other items exceeding \$500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

See attached SF-278.

21. **Statement of Net Worth:** Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached net worth statement.

22. **Potential Conflicts of Interest:**

- a. Identify the family members or other persons, parties, affiliations, pending and categories of litigation, financial arrangements or other factors that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

In connection with the nomination process, I have consulted with the Office of Government Ethics and the Department of Justice's designated agency ethics official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of an ethics agreement that I have entered into with the Department's designated agency ethics official.

- b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

In connection with the nomination process, I have consulted with the Office of Government Ethics and the Department of Justice's designated agency ethics official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of an ethics agreement that I have entered into with the Department's designated agency ethics official.

23. **Pro Bono Work:** An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each. If you are not an attorney, please use this opportunity to report significant charitable and volunteer work you may have done.

**Current Pro Bono Activities:**

**Justice Task Force**

**New York State Court of Appeals**

**2009- Present** The task force was created by the New York State Court of Appeals to improve the criminal justice system in New York and prevent wrongful convictions of innocent persons. I was appointed to the Task Force by the Chief Judge and serve on three important subcommittees: The Forensic Science Subcommittee to improve the quality of forensic evidence, the Identification Sub-committee to examine the role of misidentification in wrongful convictions and improve identification procedures in New York, and the Statements of the Accused Subcommittee to examine the role of law

enforcement interrogation and erroneous confessions in wrongful convictions and make recommendations for improvement.

**Conviction Integrity Advisory Panel**

**New York County District Attorney's Office**

**2010-Present** I was appointed to this panel by Manhattan District Attorney (DA) Cyrus Vance, Jr. DA Vance has established an ambitious conviction integrity program in the Manhattan DA's office to improve the administration of justice and prevent wrongful convictions. The advisory panel assists the office in maintaining the highest ethical standards and implementing policies, such as expedited discovery, multi-level view of prosecution charging decisions, and procedures for post conviction DNA testing.

**Sex Crimes Working Group**

**New York City Police Department (NYPD)**

**2010-Present** I was appointed to this Working Group by Police Commissioner Raymond Kelly to improve New York City Police Department's handling of sex crimes and response to victims of sexual assault.

**New York State Bar Association**

**2010-Present** In 2010, I worked with a state bar committee to plan a seminar on Use of Forensic Evidence in response to the National Institute of Science Report calling for an overhaul of the forensic science system. The goal of the seminar was to better educate judges and the bar on use of, and limitations on the use of, forensic evidence.

**Association of the Bar, City of New York**

**2009-2010** I served on a committee for the annual convocation of the Criminal Justice Council and moderated a panel on Crime Prevention and Reduction in New York State.

**Pro Bono Activities while in New York State Government**

**Re-entry work**—I coordinated state-wide re-entry policy for New York State from 2007-2010. During that time, I regularly volunteered my time to speak at conferences and community groups to promote re-entry services for formerly incarcerated persons to help them succeed after returning to the community and to reduce recidivism. I organized and chaired the New York State Re-entry Task Force that developed a statewide plan for Re-entry for New York and the Service Provider Advisory Council (SPAC) to provide a vehicle for re-entry providers to advise the state on re-entry policy.

**Drug Law Reform**- I served as Chair for the NYS Commission on Sentencing Reform from 2008-2009. The Commission's Report was published in January 2009 and provided a blueprint for the state legislature to implement meaningful reform of the drug laws in New York.

**Pro Bono Activities while in Private Practice**

While in private practice, I participated in a number of Bar Association Committees and seminars, as well as in the Volunteer Lawyers Program to provide pro bono services to indigent clients.

**Pro Bono Activities while in the US Attorney's office:****Hate Crimes Working Group.**

In 1998, I formed the Hate Crimes Working Group in Western New York to respond to incidents of hate crimes in the Greater Buffalo and Rochester Communities. The Office also organized a Hate Crimes Conference to improve the investigation and prosecution of Hate crimes.

**Weed & Seed Program**

From 1997-2001, I served as Chair of the Executive Committee of the Buffalo Weed & Seed Program, which worked with community leaders and residents to reduce crime and improve economic survival in two of Buffalo's poorest neighborhoods.

**SACSI Program**

From 1999-2001, I began the Strategic Approach To Community Safety Initiative (SACSI) in Rochester, which was a model program funded by BJA to combine community oriented policing, firearm reduction and youth violence initiatives to reduce violent crime.

**Pro Bono Program with the Volunteer Lawyers Program (VLP).**

I set up a pro bono program in the US Attorney's Office in which AUSAs could volunteer to handle pro bono cases for indigent persons through VLP. I also volunteered to handle cases through that program.

**Fair Housing Initiative**

I began a Fair Housing Initiative in the U.S. Attorney's Office to investigate housing discrimination complaints and bring civil enforcement cases in partnership with a neighborhood fair housing organization, Housing Opportunities Made Equal.

**Other Community Activities****Social Work with Disadvantaged Groups**

From 1968-1979, I worked on behalf of disadvantaged groups as a social worker. That work included child protective services, child and family counseling, drug counseling, and adoption services. I completed a two-year Masters in Social Work program where I did field placements in urban studies, drug counseling, and child and family therapy.

I served on the **Board of Directors of the National Conference for Community & Justice (NCCJ)**(Current name: National Federation for Just Communities( NFJC) from 1997-2000. NFJC does training and promotes community education and understanding of

racial, ethnic, and religious differences and differences based on sexual orientation. NFJC also operates programs for pre trial diversion of first offenders, a camp to promote diversity fairness for children, and community education and intervention programs.

I have been a member of **Housing Opportunities Made Equal**, a fair housing organization, since 1990.

## FINANCIAL STATEMENT

Denise O'Donnell

## NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks		110	000	Notes payable to banks-secured			
U.S. Government securities-add schedule				Notes payable to banks-unsecured			
Listed securities-add schedule		105	795	Notes payable to relatives			
Unlisted securities--add schedule				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due			
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgage		409	305
Real estate owned-add schedule		590	000	Chattel mortgages and other liens payable		39	000
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property							
Cash value-life insurance		60	000				
Other assets itemize:							
Schedule C Retirement Accounts		581	033				
Schedule D Personal Property		10	000				
				Total liabilities		448	305
				Net Worth		998	523
Total Assets	1	446	828	Total liabilities and net worth	1	446	828

CONTINGENT LIABILITIES		GENERAL INFORMATION			
As endorser, comaker or guarantor	No		Are any assets pledged? (Add schedule)	No	
On leases or contracts	No		Are you defendant in any suits or legal actions?	No	
Legal Claims	No		Have you ever taken bankruptcy?	No	
Provision for Federal Income Tax	No				
Other special debt	No				

**Schedule A Listed Securities**

NATIONAL FUEL GAS (S)		<b>\$430.00</b>
Roll Over IRA Investment Account	SCHROEDER BRAXTON & VOGT INC. DFA INTL CORE EQUITY FYND (IRA) TWEEDY BROWNE GLO VAL FD (IRA) DFA INTEL SMALL CAP VALUE FD (IRA) DFA REAL ESTATE SECS FD (IRA) IVY GLOBAL NATURAL RESOURCES FD (IRA) SCWAB ADVISOR SWEEP SHARES (IRA) DFA 1 YR FIXED INCOME (IRA) DFA INFLATED PROTECTED SECURITY (IRA)	105,365.60(see stock listing below) 7,449.09 9,793.53 3,567.92 4,304.40 5,005.24 1954.39 19,865.39 10,069.34
	<b>LOOMIS SAYLES BOND FD (IRA)</b>	<b>5,546.20</b>
	DFA US CORE EQUITY 2 FUND (IRA) DFA 2 YR GLOBAL FIXED INC FD (IRA) DFA EMERGING MARKETS VALUE FD (IRA) METZLER PAYDEN EUROPEAN FD.	32,107.81 2,492.71 2,361.18 848.40
Total		<b>\$105,795</b>

**Schedule B Real Estate**

Residence  
Buffalo, New York  
Estimated value: \$450,000

Residence For Son  
Buffalo, New York 14201  
Estimated value: \$ 130,000

Total \$ 580,000

**Schedule C Other Assets**

**Retirement Accounts**

NYS Deferred Compensation Account (S) \$203,200

TSP Retirement Account \$377,833

Total: \$581,033

**Schedule D Other Assets: Personal Property**

Furniture and Artwork	\$4,000
Appliances	\$1,000
China & Silver and Glassware	\$2000
Tools & Equipment	\$1000
Jewelry	\$2000
Estimated value	\$10,000

**Schedule E Real Estate Mortgages Payable**

Residence  
Buffalo, New York  
Mortgagor: Manufacturer & Traders Trust Co.  
Balance owed: \$ 300,000

Residence for son  
Buffalo, New York  
Mortgagor: HSBC  
Balance owed: \$109,304.87

Total \$ 409,305

5278 (Rev. 04/2009)  
 U.S. Office of Government Ethics  
 5 C.F.R. Part 2634  
 Executive Branch Personnel PUBLIC FINANCIAL DISCLOSURE REPORT  
 Form Approved  
 OMB No. 3309-0001

Year of Appointment, Reappointment, Extension or Nomination (Month, Day, Year)	Reporting Status (a/b/c)	Incumbent <input type="checkbox"/>	Calendar Year Covered by Report	New Entrant, Nominee, or Candidate <input checked="" type="checkbox"/>	Termination Date (If Applicable) (Month, Day, Year)	Termination Date (If Applicable) (Month, Day, Year)	Fee for Late Filing
Reporting individual's Name	Last Name O'Donnell	First Name and Middle Initial	Dismiss E				Any individual who is required to file this report and does so more than 30 days after the date the report is required to be filed, or, if an extension is granted, more than 30 days after the last day of the filing extension period shall be subject to a \$200 fee.
Position for Which Filing	Title of Position Director - Bureau of Justice Assistance	Department or Agency (If Applicable)		US Department of Justice			
Location of Present Office (for forwarding address)	Address (Number, Street, City, State, and ZIP Code)	Telephone No. (Include Area Code)		716-582-3100			
Position(s) Held with the Federal Government During the Preceding 12 Months (If Not Same as Above)	None						
Presidential Nominations Subject to Senate Confirmation	Name of Congressional Committee Considering Nomination	Do You Hold or Hold a Qualifying Appointed Post?		<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No			
Confession	Signature of Reporting Individual		Date (Month, Day, Year)				
I CERTIFY that the information I have made on this form and all attached schedules are true, complete and correct to the best of my knowledge.	<i>Devin E. O'Donnell</i>		9/20/2010				
Other Review (If General by Agency)	Signature of Other Reviewer		Date (Month, Day, Year)				
	<i>Jan M. Reed</i>		9/27/2010				
Agency Ethics Officer's Opinion (On the basis of information contained in this report, I conclude that the filer is in compliance with applicable laws and regulations (subject to any comments in the box below).)	Signature of Designated Agency Ethics Official Reviewing Official		Date (Month, Day, Year)				
	<i>Joe Hoffman</i>		9/30/10				
Office of Government Ethics Use Only	Signature		Date (Month, Day, Year)				
Comments of Reporting Officers (If additional space is required, use the reverse side of this sheet)							
If check box if filing extension granted. If indicate number of days <input type="checkbox"/>							
If check box if comments are contained on the reverse side <input type="checkbox"/>							
Agency Law Clerk							
OGE Use Only							

Supersedes Prior Entries, Which Cannot Be Used  
 578-112 Form Disclosed in Accordance with 5 U.S.C. 552  
 NNS 7540-01-076-8444

57274 (Rev. 09/2000)  
 5 C.F.R. Part 3034  
 U.S. Office of Government Ethics

Reporting Individual's Name		SCHEDULE A										Page Number					
O'Donnell, Denise E.												2 of 9					
Assets and Income		Valuation of Assets at close of reporting period					Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.										
BLOCK A		BLOCK B					BLOCK C										
For you, your spouse, and dependent children, report each asset held for investment or the production of income which had a fair market value exceeding \$1,000 at the close of the reporting period, or which generated more than \$200 in income during the reporting period, together with such income.  For yourself, also report the source and actual amount of earned income exceeding \$200 (other than from the U.S. Government). For your spouse, report the source but not the amount of earned income of more than \$1,000 (except report the actual amount of any bonuses over \$200 of your spouse).  None <input type="checkbox"/>		For you, your spouse, and dependent children, report each asset held for investment or the production of income which had a fair market value exceeding \$1,000 at the close of the reporting period, or which generated more than \$200 in income during the reporting period, together with such income.  For yourself, also report the source and actual amount of earned income exceeding \$200 (other than from the U.S. Government). For your spouse, report the source but not the amount of earned income of more than \$1,000 (except report the actual amount of any bonuses over \$200 of your spouse).  None <input type="checkbox"/>					For you, your spouse, and dependent children, report each asset held for investment or the production of income which had a fair market value exceeding \$1,000 at the close of the reporting period, or which generated more than \$200 in income during the reporting period, together with such income.  For yourself, also report the source and actual amount of earned income exceeding \$200 (other than from the U.S. Government). For your spouse, report the source but not the amount of earned income of more than \$1,000 (except report the actual amount of any bonuses over \$200 of your spouse).  None <input type="checkbox"/>					Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.)  Only if Honorary				
														Type	Amount		
Examples																	
1												Salary	\$217,100.00				
2												Salary (S)					
3																	
4																	
5																	
6																	
State of New York																	
State of New York (S)																	
M & T Bank (Joint Checking)																	
M & T Bank (Checking)																	
M & T Bank (Savings)																	
M & T Bank (CDs)																	

This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.  
 Prior Editions Cannot be Used





3278 (Rev. 03/2000)  
 2 C.F.R. Part 2034  
 U.S. Office of Government Ethics

Reporting Individual's Name: **O'Donnell, Denise E.** Page Number: **5 of 9**

**SCHEDULE A continued**  
(Use only if needed)

Assets and Income BLOCK A	Valuation of Assets at close of reporting period BLOCK B							Income: type and amount. If "None for less than \$201" is checked, no other entry is needed in Block C for that item. BLOCK C										Date (Mo., Day, Yr.) Date if Honorary
	None	0 - \$100,000	\$100,001 - \$250,000	\$250,001 - \$500,000	Over \$1,000,000	\$5,000,001 - \$25,000,000	Over \$50,000,000	None for less than \$201	\$1,001 - \$1,500	\$1,501 - \$5,000	\$5,001 - \$15,000	\$15,001 - \$50,000	Over \$1,000,000	Over \$5,000,000	Other Income (Specify Type & Amount)			
1 DFA 2 Yr Global Fixed Income Fund (IRA)																		
2 Fidelity Magellan (S) ( NYS Deferred) Compensation Plan																		
3 T Rowe Equity Income Fund (S) (NYS Deferred Compensation Plan)																		
4																		
5																		
6																		
7																		
8																		
9																		

\* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.  
 Plan Effective Dates to be Used.



SF 778 (Rev. 03/2009)  
 5 C.F.R. Part 2634  
 U.S. Office of Government Ethics  
**Do not Complete Schedule B if you are a new entrant, nominee, or Vice Presidential or Presidential Candidate**

Reporting Individual's Name: **O'Donnell, Denise E.** Page Number: **7 of 9**

**SCHEDULE B continued**  
(Use only if needed)

**Part I: Transactions**

	Transaction Type(s)	Date (Mo., Day, Yr.)	Amount of Transaction (\$) <sup>(1)</sup>														
			Purchase	Sale	Exchange	\$1,000	\$1,001 - \$10,000	\$10,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$250,000	\$250,001 - \$500,000	\$500,001 - \$1,000,000	\$1,000,001 - \$5,000,000	\$5,000,001 - \$10,000,000	Over	Over \$10,000,000	
1	Example: Control Airfares Common	X															
2																	
3																	
4																	
5																	
6																	
7																	
8																	
9																	
10																	
11																	
12																	
13																	
14																	
15																	
16																	

<sup>(1)</sup> This category applies only if the underlying asset is solely that of the filer's spouse or dependent children. If the underlying asset is either held by the filer or jointly held by the filer with the spouse or dependent children, use the other higher categories of value, as appropriate.

Prior Editions Cannot Be Used.

32-279 (Rev. 05/2000)  
 S.C.F.A. Part 204  
 U.S. Office of Consumer Affairs

Reporting individual's Name: **O'Donnell, Denise E.** Page Number: **8 of 9**

**SCHEDULE C**

**Part I: Liabilities**  
 Report liabilities over \$10,000 owed to any one creditor at any time during the reporting period by you, your spouse, or dependent children. Check the highest amount owed during the reporting period. Exclude a mortgage on your personal residence unless it is rented out, been secured by assets other than household furniture or appliances, and liabilities owed to certain relatives listed in instructions. See instructions for revolving charge accounts.

None <input type="checkbox"/>	Category of Amount or Value (\$)											
	\$10,000 - \$14,999	\$15,000 - \$19,999	\$20,000 - \$24,999	\$25,000 - \$29,999	\$30,000 - \$34,999	\$35,000 - \$39,999	\$40,000 - \$44,999	\$45,000 - \$49,999	\$50,000 - \$54,999	\$55,000 - \$59,999	\$60,000 - \$64,999	
Example:												
1												
2												
3												
4												
5												

This category system only if the liability is solely that of the filer's spouse or dependent children. If the liability is that of the filer or a joint liability of the filer with the spouse or dependent children, mark the other higher categories, as appropriate.

**Part II: Agreements or Arrangements**  
 Report your agreements or arrangements for: continuing participation in an employee benefit plan (e.g. 401k, deferred compensation); (2) continuation payment by a former employer (including severance payments); (3) leaves of absence; and (4) furlow employment. See instructions regarding the reporting of negotiations for any of these arrangements or benefits.

None <input type="checkbox"/>	Status and Terms of any Agreement or Arrangement	Parties	Date
Example:	Partner in partnership agreement, will receive lump sum payment of capital account & partnership share calculated on service performed through 1/01.	Doe Jones & Smith, Hometown, Sme	7/83
1	I continue to participate in the Hodgson Russ Retirement Plan, a defined benefit plan. Since my resignation from the firm, neither the firm nor I continue to make any contributions to the plan.	Hodgson Russ, LLP, Buffalo, NY	6/01
2	I continue to participate in the NYS Retirement System, a defined benefit plan. Since my resignation from state employment, neither the State of New York nor I continue to make any contributions to the plan.	State of New York	6/07
3			
4			
5			
6			

Three Digits Cannot Be Used

SP 278 (Rev. 02/2006)  
 5 C.F.R. Part 2424  
 U.S. Office of Government Ethics

Reporting Individual's Name O'Donnell, Carole E.	<b>SCHEDULE D</b>	Page Number 9 of 9
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**Part I: Positions Held Outside U.S. Government**  
 Report any positions held during the applicable reporting period, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude recipients with religious, social, fraternal, or political entities and those solely of an honorary nature.

None	None	None	None	None	None	None	None	None	None
Organization (Name and Address)	Type of Organization	Position Held	From (Mo., Yr.)	To (Mo., Yr.)	From (Mo., Yr.)	To (Mo., Yr.)	From (Mo., Yr.)	To (Mo., Yr.)	From (Mo., Yr.)
<i>Example:</i> Nat. Assn. of Book Collectors, NY, NY	Non-profit education	President	6/92	Present					
<i>Example:</i> Doe Jones & Smith, Hometown, State	Law firm	Partner	7/83	1/80					
1 State of New York	State Government	Deputy Secretary for Public Safety Comm, Div of Criminal Justice Ser	2/2007	2/2010					
2 University at Buffalo Foundation, Buffalo, New York (uncompensated)	Not-for-Profit Research Foundation	Director	6/07	6/10					
3 National Association of Former US Attorneys (uncompensated)	Professional Organization	Director	10/2003	10/2006					
4									
5									
6									

**Part II: Compensation In Excess Of \$5,000 Paid by One Source**  
 Report sources of more than \$5,000 compensation received by you or your business affiliation for services provided directly by you during any one year of the reporting period. This includes the names of clients and customers of any corporation, firm, partnership, or other business enterprise, or any other non-profit organization when you directly provided the services generating a fee or payment of more than \$5,000. You need not report the U.S. Government as a source. Do not complete this part if you are an incumbent, Termination Filer, or Vice Presidential or Presidential Candidate.

None	None	None	None	None	None	None	None	None	None
Source (Name and Address)	Brief Description of Duties	From (Mo., Yr.)	To (Mo., Yr.)						
<i>Example:</i> Doe Jones & Smith, Hometown, State	Legal services								
<i>Example:</i> Hometown University (Client of Doe Jones & Smith), Hometown, State	Legal services in connection with university construction								
1 State of New York	Salary								
2 Hodgson Russ LLP, Buffalo, New York	Legal services provided prior to 2008								
3									
4									
5									
6									

Three Editions Cannot Be Used

AFFIDAVIT

I, Denise E. O'Donnell, do swear  
that the information provided in this statement is, to the best  
of my knowledge, true and accurate.

February 2, 2011  
(DATE)

Denise E O'Donnell  
(NAME)

Darlene Maciejewski  
(NOTARY)

Darlene Maciejewski  
Notary Public, State of New York  
Qualified in Erie County  
No. 01MA4839275  
Commission Expires March 30, 2011

Senator WHITEHOUSE. Thank you.

I have the privilege of leading off, and I will ask questions briefly and then turn to the co-chair of this hearing. But we are joined by the Committee Chairman and the Ranking Member, and so I will take both the Committee Chairman and the Ranking Member out of order afterwards, and then we will go on to those who have been here.

Chairman Leahy. And, Mr. Chairman, if you would yield just a moment, I think Ms. O'Donnell we should have had—with the litany of the names, we should have had her on March 17th, is when we should have had the hearing.

[Laughter.]

Ms. O'DONNELL. Thank you, Senator. I was busy that day.

[Laughter.]

Senator WHITEHOUSE. Mr. Verrilli, the Justice Department recently indicated in a letter to Congress and in court filings that it would no longer defend the constitutionality of the Defense of Marriage Act. I personally believe that DOMA was discriminatory and wrong, and I hope that it is quickly struck down or repealed. I am pleased to have cosponsored the Respect for Marriage Act with many other members of this Committee. But that is a little bit beside the point today.

Mr. Verrilli, can you describe your involvement in the administration's decision to no longer defend the constitutionality of DOMA? And can you also share with us what standard you would use, if confirmed as Solicitor General, for deciding which statutes to decline to defend against constitutional challenge?

Mr. VERRILLI. Of course, Senator, but if I could start by amending an oversight in my introduction, I would like to thank Senator Blumenthal for that extraordinarily generous introduction.

Having done that, we will move to your question. The short answer to your question, Senator, is that I had no involvement in any decision with respect to the defense of DOMA. I was recused from that matter as a consequence of the ethics pledge that I signed as an administration official upon coming into the executive branch. That ethics pledge imposed a 2-year bar on participation in any matter in which one's former employer was involved. My former law firm, Jenner & Block, was involved in at least one of the pieces of litigation challenging the act. I was not personally involved in the litigation, but my law firm was. And so as a consequence of the ethics pledge, I did not participate in any way in the decision respecting DOMA.

With respect to the question of what standard I would apply if I am confirmed to the position of Solicitor General, I want to say first that I understand very well that the Solicitor General has responsibilities to this co-equal branch of Government, to the Congress, and that the core of that responsibility is to defend statutes that this body enacts. And if I am confirmed, I will apply the same standard that Solicitors General have applied historically and the Department of Justice applies. I will defend statutes when this body enacts them and when they are challenged as unconstitutional in court. And there are only two exceptions to that obligation. They are very rare, and they are the same exceptions that all prior Solicitors General have acknowledged.

First, if in the view of the executive branch the legislation violates the separation of powers by making an incursion into the President's constitutional domain, that is one exception where there would not be a defense.

The second is if there is no reasonable argument that can be advanced in defense of the statute.

Those are the two and only two exceptions, and they are rare.

Senator WHITEHOUSE. Thank you, Mr. Verrilli. I think since I am going to be here until the end of hearing, I am going to reserve any further questions I may have for anybody else on the panel and turn to my distinguished co-chair, Senator Hatch, and then to our Chairman, Chairman Leahy, and then to our Ranking Member, Senator Grassley.

Senator HATCH. Well, I will defer to the Ranking Member, Senator Grassley, for his questions, and then I will question, if I could, after Senator Leahy.

Senator WHITEHOUSE. We will do that. Grassley, Leahy, Hatch will be the order.

Senator GRASSLEY. Mr. Verrilli, a little bit along the lines of where the distinguished Acting Chairman left off, I would like to explore with you how you review the role of Solicitor General. Many times you as Solicitor General may not personally agree with a particular statute, yet you must enforce and defend these laws, regardless of your personal views, and I believe you must do so vigorously. I do not have any doubt that you would do that because that is your duty. You do not get to pick and choose which statutes to defend.

If confirmed, would you vigorously enforce and defend the laws and the Constitution of the United States? And I believe you quite obviously said you would.

Mr. VERRILLI. Yes, I certainly will.

Senator GRASSLEY. OK. The President opposes the Defense of Marriage Act. Recently the Department of Justice announced that it would no longer defend the Act. I understand that you were recused and that that recusal ended a couple weeks ago from internal discussions on this issue based on work performed by your prior law firm. If you had been involved in the discussions in advising the President, would you have told him that the administration must defend the statute?

Mr. VERRILLI. Senator, I think that having been recused, I really did not play any role in thinking about the question of how to apply the traditional standards of reasonable argument and defense to this situation. I have read the letter that the Attorney General sent to the Congress pursuant to 28 U.S.C. Section 530(d). I have read the Attorney General's statement. Beyond that, I really do not have any developed sense about the legal analysis or issues.

But what I can say about it is that I worked at the Justice Department for a year and worked with the Attorney General, and I have worked now for a little more than a year at the White House for the President. And based on that experience, I have a great deal of confidence—certainty, really—that each of them understood the gravity of this decision, each of them understood the difficulty of the issue, and each of them undertook to make a decision based on the law.

Beyond that, I do not really think I can say more.

Senator GRASSLEY. If you are confirmed, you will be Solicitor General of the United States of America. Your client will no longer be the President. If the President believes a statute should not be defended but you believe there is a basis on which it is defended, would you vigorously defend it?

Mr. VERRILLI. Senator, I would certainly—if I believed that there was a basis for defending a statute, that would be the judgment I would make, that it ought to be defended, and I would—to the extent the President inquired, I would certainly provide the President with that advice.

Senator GRASSLEY. Does that include the Defense of Marriage Act?

Mr. VERRILLI. Well, Senator, the President has made a decision about the Defense of Marriage Act, and the Attorney General has made a decision about the Defense of Marriage Act.

Senator GRASSLEY. Well, then I think you answered this question just now, but let me ask it anyway. If the Attorney General concluded that a statute should not be defended but you disagreed, what would you do?

Mr. VERRILLI. Well, I would give my best advice to the Attorney General. Ultimately the Solicitor General is exercising authority that is given by statute to the Attorney General and delegated by regulation to the Solicitor General, so it is the Attorney General's authority. But I would in all instances give my best advice.

Senator GRASSLEY. Section 2 of the Defense of Marriage Act permits States to choose whether or not to recognize same-sex marriages from other States. Do you believe that this is a valid exercise of Congress' power? And would you defend Section 2 of the Act if it is challenged in the Supreme Court?

Mr. VERRILLI. Senator, because I have been recused, I have not given any specific consideration to that issue, but I can pledge to you that I would apply the appropriate and traditional standards for deciding on defense of a statute in answering that question.

Senator GRASSLEY. Well, I guess to clarify, then, would you defend the Defense of Marriage Act as Solicitor General?

Mr. VERRILLI. I think the best I can say to you, Senator, is that I would in good faith apply the traditional Justice Department standards to answering that question to the extent it has not already been decided by the President and the Attorney General.

Senator GRASSLEY. You told the previous questioner, the distinguished Acting Chairman, that there were only two exceptions, and I do not see how the question I asked falls into either one of those exceptions. But I will leave it go at that.

Thank you very much, Mr. Chairman.

Senator WHITEHOUSE. Thank you, Senator Grassley.  
Chairman Leahy.

Chairman LEAHY. Thank you. Thank you, Mr. Chairman.

Let me just follow up a little on that, on DOMA. I read Attorney General Holder's detailed letter to the President, and he said he made his decision based on the legal analyses of the Justice Department, not his policy preferences. He determined that the courts apply heightened scrutiny to DOMA, a standard the Department is urging should apply because DOMA treats people differently based

on their sexual preference. The law would not pass muster under the Equal Protection Clause of the Fifth Amendment, and he said that because of that the administration could not make a reasonable argument in the court that it was constitutional.

Now, this is not really that different than any other administration. I know that in past administrations, Republican and Democratic, have done the same thing. One example brought out was in 1990 President George H.W. Bush's Acting Solicitor General did not defend an FCC policy, adopted at the urging of Congress, aimed at increasing minority ownership of radio and television stations, even though the FCC Chairman had asked the Bush administration to defend it. In fact, he submitted a brief to the Supreme Court arguing that the FCC policy violated the Equal Protection component of the Fifth Amendment, an argument they lost 5-4. That Solicitor General was John Roberts, who is now the Chief Justice of the Supreme Court.

Do you have any problem, if you are Solicitor General, to defend the constitutionality of duly enacted statutes if reasonable constitutional arguments can be made?

Mr. VERRILLI. That is the responsibility of the Solicitor General, yes, Mr. Chairman.

Chairman LEAHY. Thank you. I also wanted to commend you on the significant work you have done to protect the Sixth Amendment right to effective counsel. I worry that too often that an individual's right to effective counsel depends upon how much money they might have. And I have asked a number of nominees about one particular precedent, *Gideon v. Wainwright*. It moved me a great deal as a young law student. I had an opportunity to sit at a lunch with Justice Hugo Black shortly after he authored *Gideon*. He said he recognized, of course, the Sixth Amendment's guarantee to counsel, a fundamental right, and so on. That wonderful book, "Gideon's Trumpet," I recall reading that.

But doesn't *Gideon* stand for the principle that, to be meaningful, such a fundamental right as a right to counsel requires assurances that it can be exercised, not just that it is there but it has to be exercised? And I am thinking particularly in capital cases.

Mr. VERRILLI. Yes, Senator, I think it does.

Chairman LEAHY. OK, and it is hard to pass legislation to assure that there is effective counsel.

Now, because of your work there, some question of whether you can defend the Government's position in a capital punishment case, where they are seeking capital punishment, how do you feel about that?

Mr. VERRILLI. I understand that, Senator, there is a Federal death penalty law. It is enforced in appropriate cases. And if I were confirmed as Solicitor General, I would certainly and vigorously defend the application of the Federal death penalty law.

Chairman LEAHY. Thank you.

Ms. Seitz, good to have you here.

Ms. SEITZ. Thank you.

Chairman LEAHY. While I did not know your father, I have great admiration for his courage. The role of the Justice Department's Office of Legal Counsel is to provide impartial and independent legal advice for the executive branch, and I have watched that

carefully. I came here during the Ford administration. I have always watched OLC do that.

The last administration, though, bothered me because they worked to advance extreme theories of Executive power. Last week, the Department released portions of a November 2nd opinion from John Yoo that said FISA only provides a safe harbor for electronic surveillance and cannot restrict the President's ability to engage in warrantless searches that protect national security. That seems an extreme view that we saw during the Yoo and Bybee era.

Will you commit to do a comprehensive review of all OLC opinions currently in effect to make sure that you agree with those that are currently in effect and withdraw some that you think are either wrong or problematic?

Ms. SEITZ. Senator, I understand that a number of OLC opinions from that period have already been withdrawn or there has been an indication that they should no longer be relied on on the OLC FOIA reading room website. I understand also that a process of review is underway.

Chairman LEAHY. And you have no problem with that?

Ms. SEITZ. I have reviewed the OLC policies and procedures about when they reconsider decisions, how they go through decisions, and I would certainly commit to complying with those policies and procedures about review of OLC decisions in the past, and I have no problem with that.

Chairman LEAHY. Thank you.

Thank you, Mr. Chairman.

Senator WHITEHOUSE. Thank you, Chairman Leahy.

Senator Hatch.

Senator HATCH. I welcome all three of you to the Committee and wish you well.

Mr. Verrilli, is your duty as Solicitor General actually to defend if a reasonable argument exists or to give advice on that argument or that question?

Mr. VERRILLI. I think the longstanding tradition of the Department of Justice is to defend statutes so long as there is a reasonable argument to be made in their defense.

Senator HATCH. Right. Now, in general, is it reasonable to assume that if the Department of Justice has, in fact, defended a statute that reasonable arguments exist to support that statute?

Mr. VERRILLI. I think in analyzing the question of whether reasonable arguments exist, that would certainly be an important consideration.

Senator HATCH. That certainly would because the Department is already on record as saying it is reasonable.

Would you allow a difference in administration, a Republican administration and a Democrat administration, to decide that issue? Or would you decide it based upon the fact that there was a reason to defend the statute of the United States?

Mr. VERRILLI. I think that Solicitors General and, if I am fortunate enough to be confirmed for this position, I would approach that as a question of law, which is how it should be approached. It is a legal question, and the question is whether there are reasonable arguments that can be made in defense of the statute.

Senator HATCH. Well, let me just say this: You have impressive qualifications and a lot of support, and as I suggested in my opening statement, there are more concerns about the office than about you personally. In fact, I have a high respect for you. I need to know how you understand the Solicitor General's duty to defend the constitutionality of Federal statutes, and I want to approach that in a couple of different ways, if I can.

In *Ashcroft v. Free Speech Coalition*, the Supreme Court struck down a Federal statute banning virtual child pornography. You signed a letter to this Committee opposing legislation that would respond to that decision. You expressed grave concerns about the bill and said that it would violate the First Amendment. And as you may know, I introduced that legislation in the 108th Congress, and it was cosponsored by several members of this Committee, including the Chairman and Ranking Member. Both my bill and the conference report passed the Senate unanimously, and in 2008 the Supreme Court voted 7–2 to uphold it.

Now, I have two questions. First, do you believe that the agreements in favor of my legislation's constitutionality were reasonable? And, second, if you had been Solicitor General at the time, would you have vigorously made such arguments despite personally believing that my legislation was unconstitutional?

Mr. VERRILLI. Yes, Senator, without reservation, and if I could just say with respect to that letter, if I am remembering correctly, expressed a revulsion with respect to child pornography, which I deeply feel, and it also expressed support for appropriate and vigorously of child pornography.

I think one thing the letter said was that the legislation on which it was commenting had at least potentially a flaw that was the same flaw that had led the previous legislation to be held unconstitutional, and I was only making that narrow point. But even having said that, I just want to make absolutely clear that that is certainly a situation in which, had I been Solicitor General, I would have vigorously defended the statute.

Senator HATCH. Well, thank you. Now, let me ask about this in a different way. Previous Solicitor General nominees have strongly endorsed the duty to defend the constitutionality of Federal statutes. When now Justice Elena Kagan was here in February 2009, for example, she said that the only exceptions to this duty, as you have stated, are when there is literally no reasonable argument that can be made and when a statute "infringes directly on the powers of the President."

I think you have said that you agree with this description of the Solicitor General's duty.

Mr. VERRILLI. I think that now Justice Kagan stated the standard, yes.

Senator HATCH. OK. Now, I am sure—you know Drew Days was the first Solicitor General in the Clinton administration. He appeared before the Committee in May 1998–1993, rather. I was the Ranking Member of the Committee at that time and attended the hearing. He said the following: "My understanding is that although the Attorney General and the President can direct that there not be support for acts of Congress, only rare instances would justify that and would have to relate to separation-of-powers issues." Do

you agree with that? I think you have pretty well said you agree with that.

Mr. VERRILLI. Well, I think that the—I think I agree with what General Days said, that the President and the Attorney General—at the end of the day, the Solicitor General works for the Attorney General, who works for the President, and, therefore, the Attorney General or the President can issue a direction of that kind. I do think that the standards that the Attorney General would apply would be the same traditional, longstanding standards that the Department of Justice applies generally. And so I think that the question really would be whether the Attorney General or the President are satisfied that those standards are met. There are going to be very rare instances. They are very difficult cases. But I think that would be the question they would have to answer.

Senator HATCH. Thank you. My time is up, but I do have some further questions.

Senator WHITEHOUSE. We can continue into a second round once everybody has had their first round.

Next in order is Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman. Congratulations to all of you.

Ms. Seitz, if you are confirmed, you are going to be taking over as the head of an office that has gone without a Senate-confirmed leader for 7 years since Jack Goldsmith left in 2004. What would some of your first priorities be if you were confirmed to serve in that position?

Ms. SEITZ. Thank you, Senator. The Office of Legal Counsel is primarily a reactive office—that is, the—

Senator KLOBUCHAR. Really.

Ms. SEITZ [continuing]. Problems come to it rather than it setting an agenda for resolution of decisions. So I assume that the problems that face the Department and agencies and the Presidency would form the basis for the legal questions which would then come to me, which would set my agenda for me.

Just as a person coming into that situation with an absolutely stellar group of attorney advisers and first-class political and non-political deputies, I think my first step would be to learn from them, and then my second step would be to do my best to give the candid, principled, and independent advice that that office is called on to give.

But we do not really set an agenda. The country sets the agenda for that office.

Senator KLOBUCHAR. Thank you.

Ms. O'Donnell, the Director of the Bureau of Justice Assistance is a very important job, and I know that the goal—I know this as a former prosecutor. We worked with your office. But the goal is to create safer communities. And along with administering local grants and training local agents, two components of your job description really stick out to me: the first is the idea of encouraging innovation in programs; and, second, creating accountability for projects.

As you know if you have been watching the news, we are in some very vigorous debates about the budget and how we best use the money that we have. Could you talk about how you would focus on

making the work of this Department as accountable as possible to the public?

Ms. O'DONNELL. Absolutely. Thank you, Senator. As you heard from Senator Schumer, I did have the responsibility of serving as director of an agency that was the criminal justice agency that received BJA funds, so I have a track record and experience for making sure that we are accountable for those funds and consider it a priority to be a careful steward of funds that are entrusted to any agency that I would lead, would I be fortunate enough to be confirmed to head BJA.

I think it is important to be fair and be objective in terms of the grant administration process and to ensure that we build in accountability measures and track the performance of the grants that we are funding.

I also think that the role and the course that BJA is really headed on is to ensure that we promote evidence-based practice so that we support programs that have been proven and shown by the data to really work.

Senator KLOBUCHAR. I think that is going to be very important as we move forward. I think there has been more and more of that in criminal justice, but there has to be even more because sometimes people just keep going to one program because it has been there a long time. I think it is very important to look at them, so thank you.

Mr. Verrilli, I just had one last question here for you. You have argued 12 cases before the Supreme Court, and I know that the Judiciary Committee received a letter on your behalf from almost 80 appellate advocates, folks from across the political spectrum singing your praises. In part, the letter reads, "The successful functioning of the Solicitor General's office requires an ability to see the effects of particular arguments on the overall interests of the United States, both across agencies and over the long term. Shaping arguments to respect those interests and to protect the special credibility the office has acquired over the decades of its existence while maintaining clarity and force in presentations demands the whole range of knowledge, intelligence, judgment, and other capacities that Don has in abundance."

That is pretty nice. That is not my question, though.

[Laughter.]

Senator KLOBUCHAR. My question is: The part of the letter that interests me, it says how important it is to protect the special credibility the office has acquired over the decades of its existence. How do you intend to do that?

Mr. VERRILLI. I intend to do that by following in the footsteps, if I am confirmed, of the great Solicitors General we have had in my lifetime as a lawyer, and the way in which they have distinguished themselves is by acting with integrity, acting with independence, calling them as they see them, essentially, and understanding that they have an obligation to all three branches of Government, they have an obligation to the rule of law. And I would, if I am confirmed, do my best to live up to those standards.

Senator KLOBUCHAR. Thank you very much.

Senator WHITEHOUSE. Senator Lee.

Senator LEE. Thanks to all three of you for being here today. It is an honor to be here with you.

Mr. Verrilli, I just had a few questions for you. Do you believe that it is the duty of the Solicitor General to advance the political agenda of the President?

Mr. VERRILLI. No, Senator, I do not think—I think the duty of the Solicitor General is to advance the long-term institutional interests of the United States, and it is not a partisan job.

Senator LEE. So it is possible that those two things can conflict, the political agenda of the President on the one hand and the legal obligation to the United States on the other?

Mr. VERRILLI. Well, I think partisan considerations really should play no role in the judgment that a Solicitor General makes.

Senator LEE. And it should be based on your understanding of the law and your ability to convey arguments to the Supreme Court based on the law and based on the Constitution and so forth. Is that—

Mr. VERRILLI. Certainly.

Senator LEE. If I understand it correctly, Attorney General Holder sent a letter to House Speaker Boehner explaining the decision no longer to defend DOMA, and in that letter Attorney General Holder explained as follows. He said, “Previously, the administration has defended Section 3 of DOMA in jurisdictions where circuit courts have already held that classifications based on sexual orientation are subject to rational basis review, and it has advanced arguments to defend DOMA Section 3 under the binding standard that has applied in those cases.”

He acknowledged that the Department of Justice attorneys had defended DOMA Section 3 on that basis, on the basis that rational basis review would apply. Is that your understanding as well?

Mr. VERRILLI. I have read the letter. I think that is what it says.

Senator LEE. OK. Then the letter goes on to explain why he believes that that is not the appropriate standard, that heightened scrutiny ought to apply rather than rational basis. He goes on also to conclude that there is no reasonable argument that can be made to defend DOMA Section 3 under the rational basis standard or otherwise. So my question for you is: If the Department of Justice has defended the law that it later determines to have been so unconstitutional that no reasonable argument can be made in defense of it, does that mean that the Department of Justice attorneys who previously defended that law acted unreasonably?

Mr. VERRILLI. No, Senator, I do not think so. I mean, you know, these are quite rare circumstances, but they do arise, and they really have arisen in most administrations. There is an example that when Paul Clement, who was a superb Solicitor General, was here for his confirmation hearing, he described a case involving a law that this body had enacted which had prohibited bus advertisements favoring the legalization of marijuana for transit systems that received Federal funds, and that was a case that the Department of Justice had defended in the trial courts. There was a constitutional challenge to it, and the Department of Justice defended it in the trial courts, did its best. And as he explained to this Committee that, when he looked at it, he just made a judgment that applying the traditional standards you just could not mount a rea-

sonable constitutional defense for it, and so he changed. And I do not think that implies anything about the judgment of the lawyers who had previously handled the case, and I think these things are really tough, and people make the best decisions they can. They apply the standards. They act in good faith. They take it seriously. They wrestle with it, and they do their best. So I do not think it implies anything one way or another about the reasonableness of the prior judgment.

Senator LEE. Although here they are disagreeing not only as to the ultimate outcome as to constitutionality, but as to the standard that should apply, and they are arguing that no reasonable argument could be made that rational basis scrutiny would govern. That does seem to me to require a certain conclusion as a condition precedent to this decision not to defend it that those Department of Justice lawyers who previously defended it acted unreasonably in their defense of DOMA.

Mr. VERRILLI. Well, you know, because I was recused, I really—all I really know is what is in the letter. Having said that, I still do not think that I would be—I do not think I would reach that conclusion because these are tough decisions and people act in the best of faith and they make judgments that they think are reasonable.

Senator LEE. Sure. And they sometimes make policy judgments, and it appears to me that this was a policy judgment made by this administration that although previous administrations had defended the law—the Clinton administration, given that President Clinton signed it into law, the Bush administration, and even the Obama administration had defended it—for policy reasons it was no longer going to defend it. But do you believe that a change in policy, a political calculation-based policy decision should affect the way the Solicitor General operates in deciding when, whether, and under what circumstances to defend a law?

Mr. VERRILLI. With respect to this decision, the DOMA decision, because I was recused, as I said, all I can say about it is based on having worked with the Attorney General and having worked for this President. And I do have confidence, Senator, that they wrestled with it, understood it was a rare circumstance and a grave decision, and made the best judgment they could on the law. And I think if I were confirmed as Solicitor General, I can assure you that decisions I make will be made on the law and not on partisan considerations.

Senator WHITEHOUSE. Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman.

Ms. O'Donnell, for the past two Congresses, I have worked with Ranking Member Grassley and with Chairman Leahy to introduce and pass legislation to eliminate our Nation's rape kit backlog. As I am sure you know from your work in New York, there are thousands of untested rape kits in crime labs and police departments all around the country, and victims are suffering because of it, and there are new victims because of the backlog.

As part of the Government's economic recovery efforts, BJA awarded 12 grants to enhance forensic and crime scene investigations, three of which went to local governments in Minnesota. The BJA is also promoting the National Institute of Justice's new initia-

tive on sexual assault kit evidence which will identify solutions to the nationwide problem of untested evidence.

If you are confirmed, what will you do to ensure that BJA continues to coordinate and collaborate its work with other bureaus to work toward the goal of testing every evidence kit in this country?

Ms. O'DONNELL. Well, thank you, Senator. I did have the responsibility to oversee the DNA data bank in New York in my prior position. I know how important DNA is to solving crime, and particularly cases of sexual assault, as you point out. So I would certainly make this an important priority at BJA, were I fortunate enough to be confirmed.

I know also that other OJP components, particularly NIJ has taken the lead in this area as well, and I think it is important that the different components collaborate and work together to try to support important initiatives like that.

Senator FRANKEN. Ms. Seitz, your amicus brief in *Grutter v. Bollinger* on behalf of former Pentagon officials received a lot of attention in that case. Can you tell us about that brief and about the position of those Pentagon officials?

Ms. SEITZ. In that brief we sought to make a contribution to the litigation in the Supreme Court of the question whether the affirmative action programs in place at the University of Michigan undergrad and in the law school were constitutional. One of the questions that might be helpful was the extent to which diversity was an important consideration in both admission to the military academies and in the constitution of the officer corps of the military branches of the U.S. Government. And so we, on behalf of a very prominent group of military officials, went to them and asked for their perspective on this as well as doing research into the policies at the various military academies and drafted a brief that was essentially descriptive of their views that diversity in the officer corps and diversity among those being trained for the officer corps was critically important. And so on their behalf, we simply presented that description of the interests of those military officers in that case, and that was an important consideration to the court in resolving the matter.

Senator FRANKEN. So my impression is that the court agreed with your arguments in the brief. Is that correct?

Ms. SEITZ. There were actually two cases, and what the court found was that the policy at undergraduate admissions was not constitutional and the policy in the admissions process in the law school was constitutional. And so there was sort of a division of opinion with respect to the constitutionality.

Senator FRANKEN. Thank you.

Mr. Verrilli, if you are confirmed for this position, you will be responsible for coordinating the defense of the Affordable Care Act in our Nation's courts. That is an important job, and while I feel comfortable that the statute is constitutional, it is also a tough job.

Tell me, why do you want to do this job?

[Laughter.]

Mr. VERRILLI. Well, really so that I could get a chance to testify here today in front of this Committee.

[Laughter.]

Senator FRANKEN. That is a sufficient answer. Thank you.

[Laughter.]

Mr. VERRILLI. It is because it would be an extraordinary honor and privilege to represent the United States in front of the Supreme Court. I cannot think of anything that a person who loves this country and who loves being a lawyer could want to have more than the opportunity to serve in this role.

Senator FRANKEN. I think that is a better answer.

[Laughter.]

Senator FRANKEN. Thank you, Mr. Chairman.

Senator WHITEHOUSE. Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Mr. Chairman.

I would like to ask Ms. O'Donnell: This morning for about 2½ hours this Committee heard testimony from the Director of the FBI, and one of the points he made was the importance of resources. In fact, he said that the cuts that are contemplated under one of the budgets that is before the Congress now would prevent him from filling about 1,100 positions in the FBI, which would stall and severely undermine efforts to enforce the law. So resources matter. Cuts in the Federal budget have consequences not only to the Department of Justice but also to many of the State and local agencies with whom you will be working if you are confirmed.

So I wonder if you could perhaps give us your views based not only on your nomination for this position at the Department of Justice but also as a line attorney in the Department of Justice, as an Assistant United States Attorney, and as United States Attorney in the Western District of New York as to the importance of resources in enforcing the law.

Ms. O'DONNELL. Thank you, Senator. Well, it is clear that law enforcement cannot do it without the resources to get the job done, and I think it is important that we provide the kind of support that our law enforcement officers need.

On the State and local side, I would say that pretty much everything innovative being done by law enforcement in most of the States is done because of funding received from BJA, and in particular the Byrne grant funding. It funds innovative programs. It funds drug courts. It funds bulletproof vests. Like we said, it funds important intelligence-sharing capabilities. And those funds are really critical to all of our State and local and tribal partners, so we need the resources on the Federal side to support our Federal agencies, and our State and local law enforcement officers who are on the front lines fighting crime every day really require that we support their efforts.

Senator BLUMENTHAL. Thank you.

Mr. Verrilli, as you have heard, there has been a lot of interest in when, if at all, you would decline to pursue a case because you thought there was no reasonable argument that could be made for the position of the United States, and you have referred to it as "rare" that you would reach that conclusion. And I assume by "rare" you do not just mean rare in the sense that we as lawyers rarely argue before the United States Supreme Court or we rarely take a trip around the world. It would be almost a unique situation that would cause you to reach that conclusion. Is that correct?

Mr. VERRILLI. Yes, definitely, Senator. These are really grave decisions, and they should be undertaken only with a deep, deep

sense of the gravity and a deep sense of the responsibility and the strong presumption of constitutionality that every enactment of this body has.

Senator BLUMENTHAL. In fact, in seeking to uphold statutes, lawyers begin, if they represent either a State or the United States, with the argument that every statute that is passed by this legislative body, which represents the people of the United States, is entitled to a presumption of constitutionality. Is that so?

Mr. VERRILLI. That is absolutely right, Senator.

Senator BLUMENTHAL. And that is the approach you would take as Solicitor General of the United States?

Mr. VERRILLI. Yes, that is what I believe.

Senator BLUMENTHAL. Thank you.

Senator WHITEHOUSE. It would now ordinarily be Senator Sessions' turn, but he has graciously yielded to Senator Hatch, so I will turn to Senator Hatch and then Senator Sessions.

Senator HATCH. Thank you. I have to get back to the office.

I want to tell you two women that I think you are both very, very competent and good people. I had some questions for you, but I am not going to ask them. I intend to support both of you and wish you the very best in your positions. I just want to finish with Mr. Verrilli for a minute.

Now, I acknowledge and realize that you were not in a decision-making role with regard to the DOMA matter and that it has been made and that this should not fall in your lap. But with respect, I need a simple and clear answer to this, and I think others will need this. If you believe that reasonable arguments exist to defend a statute's constitutionality but the Attorney General or President say otherwise, will you defend the statutes or not or resign?

Mr. VERRILLI. Senator, I would defend the statute unless instructed by my superior not to do so.

Senator HATCH. Well, see, that is not a good answer. The Solicitor General has the obligation of defending the statute under those two conditions, and I added "or resign" not to get you out of the Solicitor General's office but to give you a reasonable out if you disagree with the President and/or the Attorney General on something as monumental as many think this issue is, or a similar issue. So I am just asking you, would you allow the President of the United States or the Attorney General of the United States to dictate to you as Solicitor General what you have got to do even though you know it is wrong under the rules and law?

Mr. VERRILLI. Well, Senator, the Solicitor General—

Senator HATCH. You have the right to resign, but—

Mr. VERRILLI. Yes, Senator. The Attorney General was given the authority by Congress and has delegated that to the Solicitor General, and the Solicitor General is exercising the Attorney General's authority, and—

Senator HATCH. No. The Solicitor General is exercising authority for our country.

Mr. VERRILLI. Yes, absolutely. Absolutely. He is exercising the judgment for our country.

Senator HATCH. And irrespective of the Attorney General, and if you disagreed with the Attorney General, you know, that—let us just say if you disagree with the Attorney General, you have two

choices, and you believe there is a reasonable reason for bringing the case or it does not involve the separation of powers, which are the two categories, then it looks to me like the only choice you have—if the Attorney General insists on making you do something you disagree with, the only choice you would have would be to resign.

Mr. VERRILLI. Well, I think resignation would be a very weighty step.

Senator HATCH. Right.

Mr. VERRILLI. I do not think, Senator, that disagreement is the standard for resignation.

Senator HATCH. We are not just talking about disagreement. We are talking about disagreement on principles that have long been established in the Justice Department over whether or not the Justice Department should act on behalf of the Congress—well, on behalf of the statute duly passed by the Congress of the United States. This is important to us. We really believe, when we pass statutes up here, even when I am in the minority, that those statutes ought to be defended by the Justice Department unless you cannot find any reason to defend them or they infringe on the power of the President.

Mr. VERRILLI. Yes, Senator, and, you know, I think those standards are the correct standards.

Senator HATCH. Well, then, if they are, why would you not resign if you were told to do something that you did not believe was right?

Mr. VERRILLI. Well, I think, Senator, it is just—

Senator HATCH. I am not trying to get you to resign. I am trying to get you in there as Solicitor General.

Mr. VERRILLI. I am just trying to give you my best, honest answer here. I think resignation is a very weighty step, and it is something that I just find impossible to answer in the abstract, and I think the answer is, Are there circumstances in which I would feel that integrity and principle required me to resign? Certainly yes. But is that every disagreement? No.

Senator HATCH. No, no. I am talking about—

Mr. VERRILLI. And so it is somewhere—

Senator HATCH [continuing]. These principles that you articulate are the principles. And I am also talking about the fact that the Solicitor General is there for a real reason. And if somebody politically tries to get you to do something that is not right, no matter if it is the Attorney General or the President, you have an obligation to stand up for what is right, at least as you view it.

Mr. VERRILLI. I have done my best to answer you, Senator. I do think there are circumstances in which integrity and principle would compel to decide to resign—

Senator HATCH. And there are circumstances where you would resign if that conflict occurred.

Mr. VERRILLI. Certainly, I cannot—as I said, it is very, very hard to answer in the abstract, but certainly there are circumstances—

Senator HATCH. I do not think it is hard. I think it is just—if you disagree with them and it is a weighty issue and the case for the Congressional statute meets those two requisites and does not—you know, fits the standards that you have discussed here, then it

seems to me you have no choice—rather than acting politically, you have no choice but to resign. And I think that is a fair question. Like I say, I am not trying to get you to resign in advance on anything. I just want you to understand that it is that important that the Solicitor General's office never be politicized in any way, shape, or form, and that you live up to those two standards as a reason for defending—look, forget DOMA. That is important to a lot of us up here, but this is the Congress of the United States. We pass statutes that we believe are constitutional. Even if you do not believe that the statute is constitutional, if there is a reasonable basis for arguing that it is, and if it does not infringe on the President and separation of powers, then it seems to me you have an obligation to go forward and defend that statute on behalf of us up here—on behalf of the Congress of the United States, one of the separated powers.

Mr. VERRILLI. Those are the standards. I believe in them, and I—

Senator HATCH. And you would live up to them?

Mr. VERRILLI. I intend to live up to them if I am confirmed.

Senator HATCH. Well, OK. I just want you to know I have deep respect for you. We may disagree philosophically. I could care less with regard to your nomination. I want to support your nomination. And you can differ with me and still have my support because of your abilities and your capacities. But these are really important questions, and, frankly, a lot of us are very upset that it looks like the Attorney General of the United States—who I supported, by the way—has played a political card rather than a legal card at the request of the President of the United States. And that should not happen in the Department of Justice. We all rely on the Department of Justice to do what is right more than, I think, any other Department. And Members of Congress rely on the Department to sustain our statutes that we go through all kinds of pain to get through the Congress and not be vetoed by the President.

So I just raise these issues because they are important issues, and like I say, I have great respect for you. You have a tremendous background, tremendous experience. There is no question you are a tremendous lawyer. And I respect both you and your wife, and I just wanted to make sure that we understand these issues as well as we can. I would feel better if you would say, "Yes, I would resign before I would do something I knew was wrong." I think you are saying that, but I would like to hear it.

[Laughter.]

Mr. VERRILLI. Well, Senator, I do believe that there could be circumstances in which integrity and principle would compel me to resign.

Senator HATCH. That is all I am asking. That is all I am asking. And I do not want you to resign. I want you to fulfill—

Mr. VERRILLI. I am not there yet.

[Laughter.]

Senator HATCH. Well, I am trying to get you there, but you are not cooperating. You are being rebellious, is all I can say.

No, I just—

Senator WHITEHOUSE. That is the independence you are looking for.

Senator HATCH. That is right. Well, God bless you, and I am very much supportive of you two women as well, and hopefully you will do a very, very good job that will be apolitical in nature and that will carry on the duties of the Justice Department in your respective positions.

Thank you.

Senator WHITEHOUSE. Senator Sessions.

Senator SESSIONS. I share Senator Hatch's views very, very deeply, and I am very troubled by this White House and the Attorney General in failing to defend DOMA, the Defense of Marriage Act. It is unacceptable. It cannot be justified. It was direct interference politically by the President of the United States who during the campaign said he accepted and supported this Act. To say that Act is indefensible constitutionally cannot be justified. Two district courts have upheld it, in Washington and Florida. Five Federal courts have dismissed challenges to this Act. Two district courts have found it unconstitutional. But to say it cannot be defended is not correct.

And would you not agree that in terms of all the people in the Department of Justice, the Solicitor General is the person, often called the Tenth Justice of the Supreme Court, is the one that has to stand firmest to defend the rule of law?

Mr. VERRILLI. Yes, I absolutely agree with that, Senator.

Senator SESSIONS. And so I think Senator Hatch's question about resignation is not a light matter. In other words, what—I would suggest what should have happened. The Solicitor General should have told the Attorney General, "We cannot not defend that statute. It does not comply with the law." And the Attorney General should have told the President, "I know you may have changed your mind, Mr. President, but this is a statutory law passed by the Congress of the United States. It has been upheld constitutionally, and it has to be defended. We cannot fail to defend that statute."

And then what happens? I think what happens is the President says, "Well, OK. I wish you could. Are you sure you cannot?" "No, we cannot, Mr. President. You cannot take that position." And I think he would have backed off. If not, then you have to resign.

That is the way the system works on a big issue like this because this is politics, and I went through the matter with now Justice Kagan, and I have to tell you that she took an oath before our Committee when she was confirmed as Solicitor General to defend this statute. Specifically she was asked would she defend this statute, and she said yes. And in my view—this is my—after looking at it very closely, in my view Solicitor General Kagan systematically worked with the lawyers attacking that statute to handle the appeals and the challenges to it in a way that furthered the goals of the ACLU, who were challenging it, and basically failed to aggressively defend the statute.

So I would ask you this question: Not only should not as a matter of integrity the Solicitor General defend the lawful statutes of Congress, those if they have a basis to be defended within the standards as you have articulated them, but don't you have a duty to not in any way undermine the defense of those statutes, take any action that would weaken the defense of those statutes in court?

Mr. VERRILLI. Senator, let me—

Senator SESSIONS. I am not asking you to agree with me about Justice Kagan. I am just saying as a matter of duty, if you share that word and the responsibilities it entails, that your duty includes not only defending it in court, but also taking no action that would weaken the defense of the statute.

Mr. VERRILLI. Senator, with respect to DOMA, of course, I was recused and, therefore, did not play any role in any of the litigation, not merely the decision not to defend but any of the litigation leading up to it. So I am not in a position to comment with any particularity about the way the defense was conducting. But going forward, Senator, if I am confirmed for this position, I would, of course, understand that the duty of the Solicitor General would be to defend those statutes that must be defended and to do so vigorously and to do so in a manner that does not undermine the defense of the statutes.

Senator SESSIONS. Well, I think that is somewhat—I think that is accurate.

Mr. Chairman, my time is up, and I will just conclude to say to me this is one of the more dispiriting things I have seen. I spent 15 years in the Department of Justice. My view was that a Solicitor General would never participate in what this Department's Solicitor General has participated in, the failure to defend the perfectly defensible statute. Maybe people can disagree about its constitutionality, but not that it is defensible or not. And I supported Attorney General Holder and have tried not to be a carping critic any more than necessary. But this one really hit me hard, and I think it goes to the integrity of the Department. And if you attain this position, you have got to be prepared to say no. And if you do, the politicians normally come around. You do not have to do it publicly. You just tell him, "Mr. President, you cannot do that. Mr. Attorney General, I cannot argue that way. You cannot do it. It is wrong." And usually they will back down if you will stand firm.

Thank you.

Senator WHITEHOUSE. Indeed, it would appear that Assistant Attorney General Comey did exactly that in the previous administration and I think reflected great credit on the Department in doing so. But the situation that we are presented with here is that the decision has already been made. It was made without Mr. Verrilli's participation. By the time he is confirmed, if he is confirmed, it will be behind the Department. It is not the Solicitor General's responsibility to go back and relitigate prior decisions that have been made. And I think that whatever our disagreements may be about the DOMA statute, it is not—blame is not ascribable to Mr. Verrilli in any portion, nor is this a decision that will be before him in his career because it has already been made. This decision has been taken.

Senator SESSIONS. Well, I am trying to determine whether or not the next time another political interference in the rule of law occurs, pushed by the President of the United States or the Attorney General, whether this man will say no or not. That is what we are asking. And I think—I love the Department of Justice. I believe in the rule of law. And I have just got to say I sat here through attack after attack after attack because the Attorney General fired some

United States Attorneys to put somebody else in and was accused of demeaning the integrity of the Department of Justice, and I think it was the normal kind of things that occur in appointment processes. But this goes to the integrity of the Department, the core of the integrity of the Department. At the highest levels it is unacceptable. And I hope that, if you are confirmed, you would have learned from this experience, and if you stand firm, usually they will back down.

Mr. VERRILLI. Thank you, Senator. I appreciate the advice very much.

Senator WHITEHOUSE. Let me conclude with—I left myself a little bit out of the questioning because by virtue of chairing I am always the last one here, so it is easier to let other people go and then wrap up. I just have a few points and questions.

Ms. O'Donnell, with respect to Senator Franken's questions, we have the same situation in Rhode Island; we have backed up DNA evidence and other evidence. As you know as a prosecutor from your days at the United States Attorney's Office, if the forensic evidence takes too long to develop, that can have a dramatic impact on the testimonial evidence. Witnesses disappear, their memories fade. It can compromise a case in very significant ways. While it is sitting there on the shelf, not only is potentially the evidence itself degrading, but the rest of the case is degrading as well. And anything that you can do to use your good offices to try to reinforce the States who are under immense budget pressure are having to deal with this issue I think would be very welcome, and I would appreciate that.

To Mr. Verrilli, I would just wish you well. I think that the point has been made that while there are disagreements that in your view would arise to the level of relatively minor disagreements, you can see the other side of the argument, for instance, and it is not the kind of disagreement with a superior that justifies having to resign rather than follow an order that you feel is wrong or inappropriate. I think the point of the questioning that you have received is that it needs to be clear to this Committee that you understand that the responsibilities of the Solicitor General can very well put you in that position, and you need to be willing, when those circumstances are appropriate, to take that step as necessary. And I think you made that point, but let me give you a chance to make that crystal clear.

Mr. VERRILLI. Yes, Senator, there is no doubt that if circumstances arose in which I thought as a matter of operating with personal integrity, as a matter of principle, and as a matter of ensuring fidelity to the rule of law that it was necessary for me to resign rather than carry out an order, then I would certainly do so.

Senator WHITEHOUSE. Thank you.

Ms. Seitz, we talked about this in my office briefly, and I do not want to belabor the point. But as a graduate of the Department of Justice, I remain concerned by the matter that we talked about in my office, which is that the standard that the Margolis memo applies to the Office of Legal Counsel in terms of what the Department and its Office of Professional Responsibility expect of the Office of Legal Counsel is in my reading of it lower than what is expected of a regular practitioner hustling into court with bundles of

files under his arms in a local trial court until the rules of professional conduct obligations of candor to the tribunal. And I hope that you will review that while you are there because I think it is a mistake for the Office of Legal Counsel, which has people of remarkable intellect and integrity, exercising sometimes our gravest national responsibilities, and in a position in which some of the checks and balances in an open courtroom do not apply, there is no opposing counsel to enlighten the tribunal as to the lack of candor of his or her adversary, and the tribunal—in this case, the President of the United States—might not have either the capacity or the learning or the sense of a judge to engage in the kind of independent judgment that it is a judge's job to evaluate advocates' arguments with.

So when you stack up the rule—I think it is 3.3—standard and you think of the situation in which that is applied and under which regular, ordinary lawyers are subject to discipline, it seems to me that the standard should be at least that high for the hyper-talented lawyers of the Office of Legal Counsel. So please take a look at that. If that could be corrected, I think that closes the last open issue with respect to that unhappy period in the Department's history.

Ms. SEITZ. Thank you, Senator. I will.

Senator WHITEHOUSE. And, finally, on the Affordable Care Act, just as a piece of unsolicited advice, I come from Rhode Island. We have guaranteed issue, which means that our insurance companies cannot refuse coverage to people just because they have a pre-existing condition. And we have accomplished that without any kind of a formal mandate that people have coverage. Massachusetts under the Romney plan did that, but Rhode Island has not, and I believe the other States are like us. And I say that to illustrate that there is no necessary connection between the so-called mandate and the other portions of the bill. And if the mandate has to fall, then Rhode Island stands as an example of how the other elements of the bill, particularly the restriction on chucking people off their insurance because they have pre-existing conditions, can nevertheless survive. And there has been a certain amount of sort of talk out there about how the mandate is the keystone piece and it is intrinsically linked to these other elements, and I would hate to see that develop in any way into the United States' position in that case because I think it is just plain wrong as a matter of both fact and logic. And it would be a shame if the mandate were to fall if it dragged other things down with it unnecessarily. If the mandate were to fall, that becomes the problem of the insurance industry, which was the beneficiary of the mandate to solve politically either in this body or at the State level where they have absolutely no constitutional restrictions on them.

So you may not be conversant in how the health care laws of the different States apply, but I wanted to make sure you were aware that this supposed link between the mandate and the protection of children with pre-existing conditions was an accommodation of politics in this room and is not logically necessarily, and we proved that in our State.

I wish all of you well. You will be serving, touch wood, in a great Department, one of which many of us are very, very proud. I think

you sense that in the questioning today from both sides of the aisle, and we wish you well in your future positions in that Department.

The record will be open for one further week for written follow-up questions. It goes without saying that the quicker you respond, the quicker you will be considered. So I urge rapidity as well as accuracy and completeness in the responses.

With that, the hearing is adjourned and, again, I thank you all for your commitment to public service, for the extraordinary talents that you bring to this hearing, and I congratulate your families on what is a very auspicious day.

Mr. VERRILLI. Thank you, Senator.

Ms. SEITZ. Thank you.

Ms. O'DONNELL. Thank you, Senator.

[Whereupon, at 4:30 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record.]

**QUESTIONS AND ANSWERS**

**Responses of Denise Ellen O'Donnell  
Nominee to be the Director of the Bureau of Justice Assistance  
to the Written Questions for the Record  
from Chairman Patrick J. Leahy**

**1. I am a strong supporter of the Public Safety Officers Benefits (PSOB) Act, and was proud to sponsor the Hometown Heroes Survivors Benefits Act, which expanded the PSOB program. Just recently, the Senate passed the Dale Long Emergency Medical Service Provider Protection Act, which expands the PSOB program to cover medical first responders who work for private, non-profit entities that serve our communities. I believe very strongly that the PSOB laws should work fairly and efficiently for our first responders who are disabled or killed in the line of duty. In 2007, the Judiciary Committee held a hearing to examine why the families of so many first responders were experiencing terrible delays and roadblocks in getting the benefits Congress intended. Positive changes were made as a result of that hearing, and I want that progress to continue.**

**If you are confirmed as the Director of the Bureau of Justice Assistance, will you make a commitment to work hard to ensure that the PSOB program works efficiently and that all claimants are treated fairly and respectfully?**

Response: I appreciate your focus on the importance of the Public Safety Officers Benefits (PSOB) Program. In my view, there is nothing more important than our commitment to our first responders who are disabled or killed in the line of duty and to their families. If I am confirmed as Director of the Bureau of Justice Assistance, I will do my very best to ensure the efficient administration of the PSOB program and the fair and respectful treatment of PSOB claimants.

**Response of Denise Ellen O'Donnell  
Nominee to be Director of the Bureau of Justice Assistance  
to the Written Questions of Senator Tom Coburn, M.D.**

1. **If you are confirmed, will you commit to being responsive to requests from Congressional offices for information on various programs administered by the Bureau of Justice Assistance (BJA)?**

Response: Yes, I believe it is important for BJA to be responsive to requests for information from Congressional Offices, subject to compliance with applicable OJP and DOJ disclosure policies and relevant privacy laws.

2. **What will your priorities be as Director of BJA?**

Response: If I am fortunate to be confirmed as Director of BJA, my priorities would be to administer BJA's grant awards process in a fair, effective and transparent manner that avoids waste, fraud and abuse. A second priority would be to continue to support innovative programs for state, local and tribal law enforcement who are in the front line in our crime fighting efforts, and to support the Attorney General's officer safety initiative to prevent line of duty deaths and injuries. An additional priority is to support evidenced-based public safety programs and strategies that work, and to transfer knowledge about effective programs to our state and local partners.

3. **If you are confirmed, do you have any plans for significant restructuring and/or changes to the current organization of BJA? If so, how will that increase the efficiency of the grant-making process.**

Response: I am not currently in the Department of Justice and do not have sufficient information to fully answer this question. In the past, my practice when assuming a new leadership position has been to allow an initial period of time to observe and learn about the organizational structure and staff of the agency before making changes to its structure or operations. If confirmed, I intend to carefully review the grant-making process at BJA and to work collaboratively with the staff to continue to make the process more efficient and effective.

4. **Since 2000, the Office of the Inspector General has continuously ranked grant management as one of the Justice Department's top management challenges every year. In fact, at Attorney General Holder's confirmation hearing, he recognized that this must be treated as a "consistent priority" to prevent problems.**

**a. What specific steps do you plan to take to improve grant management at the Justice Department?**

Response: Because I am not currently at BJA, I do not know to what extent BJA has implemented the recommendations from past audits of the Inspector General and Government Accountability Offices. If confirmed, I intend to carefully review the grant-making process at BJA, and the extent to which past audit recommendations have or have not been implemented. I plan to work with the staff at BJA and OJP to ensure that past deficiencies have been corrected, and that sound grant management policies are in place.

**b. Are there any particular grants administered by BJA that you believe deserve particular attention and review?**

Response: There are not any specific grants of which I am aware that merit particular attention and review more than others. I would begin my review with past audit reports from the Government Accountability Office and the Inspector General to determine whether past deficiencies identified in audit reports have been corrected.

**5. I assume you have spent some time reviewing the grant programs you will oversee at BJA. Can you give me some specific examples of waste at BJA that you intend to clean up (i.e., any egregious grants about which you have read, or know of any bad practices, etc.)?**

Response: Since I am not currently at BJA, my information about past problems in grant administration at BJA comes solely from review of publically available IG and GAO reports. Most of those findings date back a number of years. Some past findings that caused me concern were findings of missing monitoring plans, failure to document monitoring activities, failure to require progress reports, and problems with performance measures required in BJA contracts.

I am hopeful that improvements instituted by OJP under the current Administration have corrected many of the longstanding deficiencies cited in IG and GAO reports. If I am confirmed as Director, I am committed to ensuring that those reforms continue, and that sound grant management policies are in place at BJA.

One specific example of a practice that should be improved was identified in a recent GAO review of Byrne/JAG Recovery Act grants to state and local governments.<sup>1</sup> While observing favorable results regarding the procedures utilized by localities to share successful program results, GAO nevertheless identified problems with the performance measures utilized by BJA in the grant solicitation. GAO found that the performance measures lacked key attributes of successful performance measures such as clarity, reliability, a linkage to strategic or programmatic goals, objectivity and measurability of targets. The GAO report indicates that BJA and OJP are working to revise the performance measures. If I am confirmed, I intend to closely monitor

<sup>1</sup> Government Accountability Office, *Department of Justice Could Better Assess Justice Assistance Grant Program Impact*, GAO-11-87, October, 2010.

ongoing efforts at BJA to implement meaningful performance measures to measure the effectiveness of programs funded with BJA funds.

**a. If confirmed, will you commit to review all of BJA's grants for such examples, and get back to me as soon as possible with your results?**

Response: If confirmed, I intend to carefully review the grant administration process at BJA and to work with the OJP Office of Audit, Assessment and Management to continue to make the process as efficient and effective as it can be. I would be happy to report back to you on what I have learned.

**6. In describing the problems with the Justice Department's grant management process, the OIG noted this included "maintaining proper oversight over grantees to ensure the funds are used as intended." The OIG further stated that "recent OIG audits of grant recipients demonstrated a continuing need for improved grant oversight by the Department."<sup>2</sup>**

**a. What changes, if any, do you plan to make to BJA's grant oversight process and/or BJA staff assigned to review grant applications?**

Response : If confirmed, I intend to carefully review the operations of BJA with an eye toward continuing to make its operations more efficient and effective. Because I have not had an opportunity to review BJA's operations first hand, I cannot state with particularity what changes I would recommend to staffing or to the grant oversight process. In the past, my practice, when assuming a new leadership position, has been to allow an initial period of time to observe and learn about the organizational structure and staff of the agency before making changes to its structure or operations.

**b. Do you believe BJA should have mechanisms in place that provide for a review of past grant recipients and monitor the use of federal funds to avoid waste, fraud and abuse?**

Response: Yes. I believe it is critical for BJA to have effective procedures in place to monitor the use of federal funds to avoid waste, fraud and abuse. It is my understanding that OJP has instituted significant reforms in this area through the Office of Audit Assessment and Management, to strengthen the grant oversight process for all OJP components, including BJA.

**i. Should that include a requirement that grantees report on how they use federal funds in order to receive a grant?**

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<sup>2</sup> *Top Management and Performance Challenges in the Department of Justice-2008*, Office of the Inspector General, available at [http://www.usdoj.gov/oig/challenges\\_2008\\_top\\_mgm#8](http://www.usdoj.gov/oig/challenges_2008_top_mgm#8).

Response: Yes. Generally speaking, I believe it should be a requirement that grantees report how they use federal funds as a condition of receiving federal grant awards.

**ii. What role, if any, do you believe these results should play in making future grant awards?**

Response: As a general principle, I believe a grantee's record of performance on prior grants should carry substantial weight in the award of future discretionary grant funds. However, in some circumstances, grantees benefit from technical assistance and improve their capacity to administer grant funds. Those factors should be taken into consideration, as well.

**7. In your prior positions as United States Attorney and in the government of the State of New York, it appears you oversaw administration of programs funded by grants from the Bureau of Justice Assistance.**

**a. Were you also involved in applying for those grant awards? If so, how?**

Response: Yes. The Division of Criminal Justice Services, acted as the State Administrative Agency responsible for applying for grants from the Bureau of Justice Assistance. I was involved in approving the types of projects proposed for funding.

**b. Please detail the types of BJA grants you managed in your various positions, including the dollar amount and the purpose of the grant. In addition, please comment on the success and/or failure these programs.**

Response: During my tenure as Commissioner of the Division of Criminal Justice Services I directed federal dollars to both innovative and evidence-based programs. I recognize the value of investing in innovation as a way to develop new approaches to crime reduction, but I also respect and appreciate how research can assist us by identifying proven approaches which can be implemented in various jurisdictions.

One specific example of an innovative program supported with Byrne JAG funds during my tenure at the Division was Operation Impact, which received JAG funding to establish a network of local crime analysis centers throughout the state. That program proved so successful after the initial two year period of JAG funding that DCJS was able to secure state general revenue funds to continue the centers in operation permanent. Byrne JAG funding was the principle source of funding for a number successful public safety programs in New York during the time I was Commissioner.

A listing of BJA grants awarded to the State of New York while I was Commissioner of DCJS, the dollar amounts and purposes of the grants is attached as Appendix A. This list was provided to me by DCJS and is complete to the best of my knowledge and belief.

**c. As State Administrator for the State of New York, you managed a very large portfolio of federal grant funds. What did you do in that capacity to prevent waste, fraud, and abuse by grantees?**

Response: As State Administrator for the State of New York, I adopted a number of policies to prevent waste, fraud and abuse by grantees. The most important action I took immediately after my appointment was to strengthen the auditing program at DCJS, and to routinely reiterate the importance of the auditing program to the staff. I charged the auditing staff with preparing a detailed annual Audit Plan that was risk-based and designed to detect waste, fraud and abuse by grantees, as well as internally within the agency. The auditing staff significantly increased the number of grant contracts reviewed during the audit cycle. I encouraged and supported referrals of suspected waste, fraud and abuse to the Inspector General or Attorney General. Due to limitations on resources, I encouraged the monitoring staff to focus site visits and monitoring activities on open or recently closed grants to identify potential problems that could be remedied through training and technical assistance or where funds could be recovered if warranted. I believe these changes vastly improved oversight of grantees and were effective in preventing waste, fraud and abuse.

**i. Did grantees apply directly for BJA funding or did you, as State Administrator, dole out funds from a lump sum received by the State of New York?**

Response: In consultation with the Governor and the State Legislature, I determined the priorities for distributing both block grants and discretionary grants within the State. Those funds were distributed through multiple venues such as competitive Request for Proposals and direct awards.

As a matter of practice, statewide crime data was used to determine areas of concern, high risk and need. The DCJS Office of Justice Research and Performance worked directly with the grant and program offices to identify where funds were to be allocated based on crime data.

DCJS maintained a transparent procurement process by publishing all funding solicitations on the Division's website and the [State Register](#). Applications for funding were reviewed based on the guidelines

established in the funding solicitation and through a merit-based review and selection process.

**ii. If you evaluated grantees for potential receipt of BJA funds, what standards and metrics did you have in place for such evaluations?**

Response: All grant contracts issued during my tenure at DCJS contained program work plans which outlined program activities, deliverables, and performance measures. Standardized work plans containing performance benchmarks were used to ensure performance measurement data was consistent for similar projects.

Some grant contracts were performance-based. Contract language was used to withhold payment if minimum deliverables were not met. For example, a grantee might receive only the first 90% of the grant funds until acceptable documentation the project has achieved the required outcomes is received.

DCJS required the routine submission of Quarterly Progress Reports for all grant award contracts. DCJS required grantees to utilize BJA's on-line Grants Management System (GMS) for Quarterly Progress Reports which required each performance measure outlined in the contract work plan to be addressed. Grants were monitored on a quarterly basis by trained staff, and subject to audit by the Office of Internal Audit and Compliance. Audits of grant programs were selected pursuant to a risk based annual audit plan.

**8. What is your view of earmarks?**

**a. Do you believe that funds earmarked in accounts you manage at BJA can and should receive the same scrutiny as funds that are competitively bid? Or are your hands tied by Congress, such that you are obligated to award them, regardless of their merit?**

Response: In general, I do not support earmarks. I do recognize that many worthwhile public safety programs have been supported by earmarks. My expectation is that any grant award, whether an earmark or not, should be required to meet the same requirements regarding use of funds and accountability.

**b. How would the elimination of earmarks affect the distribution of monies in the control of the Director of the Bureau of Justice Assistance, if at all?**

Response: Since I am not currently at BJA, I do not have the information necessary to answer a detailed question of this nature.

**c. Would you have more leeway as to how the money is spent?**

Response: BJA would have more options for how grant funds were spent if funds were not earmarked for specific programs and localities. I would expect that elimination of earmarks would increase funds available for competitive grant programs which would be extremely beneficial given the current fiscal crisis.

**d. Will you commit to thoroughly vetting any earmarked requests and reporting to Congress when your assessment shows they should not be awarded?**

Response: In deference to Congress, I would follow Congress's direction regarding funding of earmarks and administer earmarks in accordance with current OJP policies and directives. I would do my best to ensure that grants awarded by Congress through earmarks would be subjected to the same requirements regarding use of funds and accountability as other grants.

- 9. With our federal debt at \$14.3 trillion and skyrocketing by the day, coupled with Congress' inability to control and reduce federal spending on lower priorities, grantees should be very concerned about availability of future federal funding. No doubt grantees want future funding to be consistent. Requiring grantees to match federal grant funds will ensure more fiscal stability for them in the future by relying less on the federal government so they can stand on their own. In addition, as a grantee invests additional funds into its services, it is more likely to remain truly committed to developing new and innovative strategies to help those who benefit from these grant programs. Do you agree?**

Response: I believe that matching fund grant programs are effective for some grant programs. My concern is that imposition of matching fund requirements for public safety grants will prevent economically distressed communities that need funding the most from receiving it. That concern is magnified in the current economic climate where the strain experienced at the federal level is felt with equal or even greater strength at the state and local level. The economic crisis has similarly decreased the availability of matching funds from private sources. In addition, many successful programs are only able to obtain matching funds after they have demonstrated their success. Because the availability of matching funds is severely limited in the current economic climate, I am concerned that matching fund requirements could severely limit research and innovation in the criminal justice field. I would urge Congress to continue to fund successful programs like Byrne JAG, which do not require matching funds, but have been the principal funding source for new and innovative criminal

justice programs which in the long run save taxpayer dollars by reducing crime and victimization.

**10. When President Obama took office, he promised to usher in a new era of transparency and accountability in our government. In fact, in a January 21, 2009 Presidential Memo, the President stated, “[m]y Administration is committed to creating an unprecedented level of openness in Government. We will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration. Openness will strengthen our democracy and promote efficiency and effectiveness in Government.”<sup>3</sup>**

**a. In my estimation, the federal grant-making process, which awards billions of dollars in taxpayer money each year, has the greatest need for transparency and deserves the highest level of scrutiny. If confirmed, will you commit to upholding the same level of openness that President Obama has advocated? If so, how will you promote transparency and oversight at BJA?**

Response: I feel very strongly about the importance of transparency and openness in government and strongly support the Administration’s Open Government Program. The best way to promote transparency and openness in the BJA grant process is to ensure that all grant solicitations and grant awards are widely disseminated to the public on the DCJS website. I believe this is the current practice for all OJP agencies and one that I would strictly adhere to were I confirmed as Director of BJA.

**b. If confirmed, will you be forthcoming with this Committee when you see grant programs or practices that are not working the way Congress intended?**

Response: Yes.

**c. If confirmed, will you also commit to promptly providing this Committee and other Senators with any requests for information related to programs falling under your jurisdiction?**

Response: Yes, I believe it is important to be responsive to requests for information from Congress subject only to compliance with applicable OJP and DOJ disclosure policies and relevant privacy laws.

**11. BJA is one of seven OJP program offices that award and oversee grants at the Justice Department. A recent report by the Justice Department’s Office of the Inspector General (OIG) “found that OJP’s program offices and bureaus do not consistently and thoroughly assess the programmatic, financial, and**

<sup>3</sup> *Transparency and Open Government*, Presidential Memorandum, January 21, 2009.

**administrative areas of the grants; nor do they retain adequate documentation to support their review work.”<sup>4</sup> If you are confirmed, what specific recommendations do you have for remedying this critique by the OIG?**

Response: I believe that it is critical that BJA carefully monitor progress reports on grants and retain adequate documentation of the monitoring process. It is my understanding that OJP has instituted significant reforms in this area through the Office of Audit Assessment and Management to strengthen the grant oversight process for all OJP components, including BJA. If confirmed as Director of BJA, I would do my best to ensure careful monitoring and documentation of BJA grants.

**12. Earlier this month the Government Accountability Office (GAO) released a report outlining opportunities to reduce duplication in government programs. The report states, “according to Office of Management and Budget (OMB) estimates, federal grant awards to nonfederal entities, such as states and nonprofit organizations, increased from \$300 billion in 2000 to over \$500 billion in 2009. If even a small fraction of the federal government’s total grant funding is not spent in a prudent and timely fashion, it can prevent the reallocation of scarce resources or the return of funding to the United States Treasury. Undisbursed funding is funding the federal government has obligated through a grant agreement, but which the grantee has not entirely spent.”<sup>5</sup>**

**Furthermore, GAO notes, “closeout procedures help ensure grantees have met all financial requirements, provided final reports, and that unused funds are de-obligated. However, past audits of federal agencies by GAO and Inspectors General, and agencies’ annual performance reports have suggested grant management challenges, including failure to conduct grant closeouts and undisbursed balances, are a long-standing problem.”<sup>6</sup>**

**a. Do you agree that closeout procedures are important to effective grant management, as well as to the fiscal crisis in the United States? Why or why not?**

Response: Yes. I agree that careful monitoring of grants requires strict adherence to close out procedures for the reasons stated in the GAO Audit report, namely, that funds not spent during the grant cycle should be reallocated for another permissible purpose or recovered by the U.S. Treasury. Moreover, failure to recover funds which have been allocated but not spent during the grant cycle can lead to misuse of grant funds and other forms of waste and abuse of government funds.

<sup>4</sup> Department of Justice Office of the Inspector General, *Audit of the Office of Justice Programs’ Monitoring of Recovery Act and Non-Recovery Act Grants*, Audit Report 11-19, March 2011, at p. xviii.

<sup>5</sup> Government Accountability Office, *Opportunities to Reduce Duplication in Government Programs, Save Tax Dollars, and Enhance Revenue*, GAO-11-318SP, March 2011, at 286.

<sup>6</sup> *Id.*

- b. If you are confirmed, will you commit to review the grant programs managed by BJA to determine how effective closeout procedures are working?**

Response Yes.

- c. If yes, will you commit to reporting those results to Congress, specifically to the Committee on the Judiciary, as soon as possible after your confirmation?**

Response: I would be happy to report back to you and other members of the Judiciary Committee after my review of current close out procedures utilized by BJA, should I be confirmed.

- 13. I have seen evidence that outside individuals and groups increasingly try to pressure the Department to pay all manner of public safety officers benefits claims regardless of whether they are justified by the law. I am concerned that sometimes decisions are made with regard to these claims that are driven by this outside pressure rather than by the strict requirements of the law. What assurances can you give me that you will administer the Public Safety Officers Benefits (PSOB) law according to the legislative choices that Congress has made and are reflected in the law rather than because you are relenting to outside pressure?**

Response In my view, there is nothing more important than our commitment to our first responders who are disabled or killed in the line of duty and to their families. If I am confirmed as Director of the Bureau of Justice Assistance, I will do my very best to ensure that the PSOB program is administered in a fair and efficient manner in accordance with existing laws and regulations.

- 14. According to 42 U.S.C. § 3787, one of the many responsibilities of the Director of the Bureau of Justice Administration is to appoint hearing examiners or administrative law judges who can hear appeals of denials of benefits under the PSOB program. Can you explain the process you will employ when appointing these officers to ensure that they are neutral arbiters?**

- d. What evidence or input will you consider when determining whether they can be neutral arbiters?**

Response: I am not familiar with applicable laws, regulations and policies regarding the appointment of hearing examiners and ALJs to hear appeals under the PSOB program and lack sufficient information to answer this question at this time. As a general matter, I believe that all tribunals require hearing officers which are fair and impartial and would do my best, if confirmed, to ensure that those whom I would appointment would possess those characteristics.

**15. According to the regulations, you may also review PSOB claims once the hearing examiner has made a determination. Can you explain the process you will employ when reviewing these claims?**

**a. What evidence will you consider when making your determination?**

Response: I am not familiar with applicable laws, regulations and policies governing review of PSOB Program determinations and lack sufficient information to answer this question at this time. If I am confirmed as Director of BJA, I will fully review the administrative procedures governing the PSOB Program and do my best to ensure that the program is administered in a fair and effective manner. I would be happy to meet with you to discuss your concerns about the manner in which program has been administered in the past.

APPENDIX A

Grant Name	Agency	Annual Award Amount	Active Years and Expiration	Purpose
Byrne JAG	BJA	\$16.7 M	2007 - 9/30/11	JAG funds may be used for state and local initiatives, technical assistance, training, personnel, equipment, supplies, contractual support, and criminal justice information systems that will improve or enhance such areas as: law enforcement programs; prosecution and court programs; prevention and education programs; corrections and community corrections programs; drug treatment and enforcement programs; planning, evaluation, and technology improvement programs; crime victim and witness programs (other than compensation).
		\$15.8 M	2008 - 9/30/11	
		\$567,671	2008 - supplemental - 9/30/11	
		\$16.9 M	2009-9/30/12	
		\$15.6 M	2010 - 9/30/13	
Byrne JAG ARRA	BJA	\$67.2 M	2009 - 2/28/2013	Byrne JAG Recovery Act funds will support the enactment of the comprehensive Rockefeller Drug Law reforms to support local law enforcement and prosecution programs, reentry services, substance abuse treatment, probation, judicial diversion, alternative to incarceration programs, and the operation of drug courts. Projects are revisited annually to redirect funds based on need.
Prisoner Reentry Initiative	BJA	\$815,538	2006 -5/31/2011	Support a collaborative re-entry program that would identify and prepare inmates for entry into employment programs upon their release from incarceration.
		\$540,000	2008 -3/31/2011	

Residential Substance Abuse Treatment	BJA	\$341,599	2008 - 9/30/11	Assists state and local governments to develop and implement residential treatment programs in correctional facilities. Aftercare is also permitted.
		\$373,706	2009 - 9/30/12	
		\$1,051,217	2010 - 9/30/12	

**Response of Denise Ellen O'Donnell  
Nominee to be the Director of the Bureau of Justice Assistance  
to the Written Questions for the Record of Senator Chuck Grassley**

1. **On June 4, 1998, you spoke at a naturalization ceremony. In your remarks you stated, "as a citizen of the United States, you have the right to vote and to participate in the democratic process, but with that right, comes the duty to register and to vote in elections; the duty to support qualified candidates for public office." Your statement concerns me. I think you crossed the line from celebratory remarks to a partisan admonition. When you delivered the speech, you were a U.S. Attorney, appointed by a Democratic President. It is likely that new citizens not fully appreciate the nuances of the role of a U.S. Attorney plays in representing the Government of the United States. I want to make sure you understand that as Director of the Bureau of Justice Assistance, you should not let partisanship influence any decisions you make. If confirmed, are you fully committed to carrying out your duties without regard to any political, partisan, or ideological views?**

Response: I intended to convey, through my remarks, my long held view that participation in our democracy by voting is one of the most important roles of citizenship. If I am fortunate to be confirmed as Director of BJA, I am committed to carry out my duties without regard to any political, partisan, or ideological views.

2. **How will your experience as Commissioner for New York State Division of Criminal Justice Services impact you as you take on this new responsibility, if confirmed?**

Response: My experience as Commissioner for New York State Division of Criminal Justice Services has prepared me well to serve as Director of the Bureau of Justice Assistance.

As DCJS Commissioner, I oversaw a multi-service criminal justice agency with responsibility for a number of programs similar to those supported on a national level by BJA and other Office of Justice Programs components. One of my priorities was to provide leadership, training and technical assistance to state, local, and community based public safety agencies and programs, a mission very similar to the mission of BJA.

An example of one successful effort that I chaired in New York was the state re-entry task force that implemented a new statewide re-entry plan to reduce recidivism by former offenders released from New York's prisons. That experience provided me with the necessary background and experience to help lead BJA's efforts to implement the Second Chance Act and the Administration's national re-entry initiative. Another highly effective program that I expanded at DCJS was Operation Impact which encompassed the types of proven "smart policing" strategies supported by BJA.

As Director of the state administrative agency for BJA funds, I implemented effective programs to provide greater oversight over grant funds, I strengthened the internal auditing function at DCJS and expanded a Comstat-like performance monitoring program to measure the effectiveness of programs at DCJS and other public safety agencies. These experiences will hopefully enable me to provide the kind of careful oversight of federal grant funds that the Administration, Congress and the taxpayers expect, should I be confirmed.

3. **If confirmed, what will be your biggest challenges? How will you address those challenges?**

Response: What I see as the biggest challenge facing BJA is the severe financial crisis facing state and local governments which is leading to a reduction in funding for public safety programs nationwide. Across the country, funding is being reduced for police officers, prosecutors, courts, indigent defense, crime laboratories, probation officers, domestic violence programs, treatment programs and community crime reduction efforts. I am concerned about the impact this will have on public safety. The best way to address this problem is to ensure that BJA funding is directed to state, local and tribal programs with the biggest impact on public safety and to further ensure that the funds are being used wisely to support evidenced-based programs that are effective in reducing crime.

A related challenge is developing effective performance measures to measure the effectiveness of criminal justice grants and to develop workable methodologies to measure the cost of programs in relation to the benefits to public safety. While this is a challenge, it is also an extraordinary opportunity to develop more effective criminal justice programs and strategies that will make our communities safer in the long run.

**What goals will you set for the first year on the job?**

Response: If confirmed as Director of BJA, my goals for the first year are:

- To administer BJA's grant awards process in a fair, effective and transparent manner that avoids waste, fraud and abuse.
- To support programs which provide innovation and promote information sharing in law enforcement (i.e., Smart Policing Initiative, The Regional Information Sharing Strategy (RISS), the National Suspicious Activity Initiative (NSI), the Public Safety Officer Benefits (PSOB) program and the Attorney General's officer safety initiative to reduce line of duty deaths and injuries).
- To work with state, local and tribal partners to replicate evidence-based public safety programs and strategies that work and to transfer knowledge about effective programs throughout the criminal justice system.

**4. Please describe with particularity the process by which these questions were answered.**

Response: The questions from Senator Grassley were forwarded to me by the Office of Legislative Affairs of the U.S. Department of Justice by e-mail on April 6, 2011. I drafted my answers after careful consideration of the questions. I then discussed some of my answers with representatives from the U.S. Department of Justice who are assisting me in the nomination process. I prepared my final responses to these questions thereafter.

**6. Do these answers reflect your true and personal views?**

Response: Yes.

**Responses to Senator Chuck Grassley's  
Questions for the Record to  
Virginia Seitz, Assistant Attorney General, Office of Legal Counsel**

1. In 1981, the head of the Office of Legal Counsel, Mr. William French Smith, authored a letter to the Judiciary Committee regarding the duty of the Department of Justice to defend an act of Congress. After examining the question, Mr. French concluded as follows:

**“The Department appropriately refuses to defend an act of Congress only in the rare case when the statute either infringes on the constitutional power of the Executive or when prior precedent overwhelmingly indicates that the statute is invalid. In my view, the Department has the duty to defend an act of Congress whenever a reasonable argument can be made in its support, even if the Attorney General and the lawyers examining the case conclude that the argument ultimately be unsuccessful in the courts.”**

**Please take whatever time is necessary to study the issue, and answer the following question: Do you agree with Mr. French’s assessment that the Department must defend a statute whenever a reasonable argument can be made in its defense?**

Response: I am not familiar with the letter quoted in this question. It is, however, my understanding that the Department of Justice has a longstanding practice of defending the constitutionality of acts of Congress and declines to do so only in the rare cases when no reasonable argument can be made in their support and when a law intrudes on the constitutional authority of the executive.

2. **When the Attorney General announced his decision not to defend the Defense of Marriage Act, he submitted a letter to Speaker Boehner explaining his rationale. He admitted that DOMA had been successfully defended in federal circuit courts. And, he admitted that those circuits had adopted a rational basis scrutiny. Nonetheless, the President determined – at the Attorney General’s recommendation – that DOMA should be reviewed under a heightened scrutiny, and therefore the statute was unconstitutional. Please take whatever time is necessary to study the issue, and answer the following question: Given that other circuit courts had adopted rational basis scrutiny, do you believe there is no reasonable basis on which to defend the statute?**

Response: I do not currently have a view on this question, and I would not be comfortable expressing my view without substantial legal research and analysis and access to the Department’s deliberations about that litigation and its decision, which I do not and cannot have. Based on the information that is publicly available, I understand that this matter is already in litigation and that the President and the Attorney General have decided not to defend the constitutionality of the Defense of Marriage Act. As a result, I do not believe that this issue would come before me if I were confirmed. When

questions about the constitutionality of an act of Congress do arise, I will follow the traditional OLC policies and practices in responding, including researching the relevant facts and law and engaging in consultations with other Department of Justice components and other agencies with relevant expertise and affected interests. If questions about defending the constitutionality of an act of Congress were to arise, I would follow the Department's longstanding practice described in the response to question 1.

**3. Do you agree with the Attorney General's decision not to defend the statute?**

Response: For the reasons given in response to question number 2, I have not developed a position on this question.

**4. If a constitutional challenge to a federal statute reaches the Supreme Court, do you believe the Solicitor General has an independent obligation to assess whether there is any reasonable basis on which to defend the statute?**

Response: I have not studied the statutes, regulations and history governing the particular obligations of the Solicitor General and do not know what his or her responsibilities and traditional role are in connection with the Department's longstanding tradition of defending the constitutionality of federal statutes. OLC issued an opinion, entitled *Role of the Solicitor General*, 1 Op. of the Office of Legal Counsel 228 (1977), which generally describes the Attorney General's authority and the traditional independence of the Solicitor General. It states that the Attorney General has the power to determine the position of the United States in the Supreme Court, but that the Attorney General "participate[s] in the formulation of the government's position before the Court" only in rare instances.

**5. You were a member of the National Association of Women Lawyers Evaluation Committee of Supreme Court nominees. Your Committee evaluated Chief Justice Roberts, as well as Justices Sotomayor and Kagan. Your committee gave "well or highly qualified" rankings to both Justices Sotomayor and Kagan, but only a ranking of "qualified" to Chief Justice Roberts. Last year you spoke at panel for the American Constitution Society, and commented on Justice Kagan's elevation to the Court. You said, "I am a firm believer in the power of critical mass. The level of comfort increases with numbers and ... for the first time there is a significant enough group of women on the court to see whether that has any impact or not."**

**a. Do you believe gender has any effect on the judicial decision making process?**

Response: No, I do not believe that the gender of judges has an effect on judicial decisions.

**b. What impact or change were you looking to observe in the Court from the number of female justices now present?**

Response: The presence of additional female justices (and judges) on the bench might have an impact in two ways: First, once it becomes routine to see women on a court, the public will cease to view women in the judiciary as symbols or “female judges” and will view them simply as judges. Second, judges hold positions of high visibility in the legal profession and in public life. The presence of additional women on the bench may enhance the public perception that the legal profession offers equal opportunities to all.

6. **You participated in a panel discussion for the Federalist Society that was later published in an article, *Congress and the Court*. You appear to argue that economic rights, such as property rights, are less important than non-economic rights. During the question and answer session, you were asked: “you are coming out and saying that you are willing to diminish the rights of those from whom you take the resources.” You responded: “Absolutely. Though, of course, I do not see economic rights as the kind of undivided whole in which every cent you have is your right. I certainly do not see economic rights that way.” Please fully explain what you meant by this statement.**

Response: The panel the question references took place in 1993, and I do not have a current recollection of what I meant. I was asked to participate because I had been one of the attorneys representing the AFL-CIO in several cases involving economic rights such as the contracts clause, and I was speaking from that perspective. Reading the transcript of the question and answer session, I recall that the panel was discussing judicial review of federal laws affecting economic rights, and I believe this statement was responding to a question about the lawfulness of taxes and tax increases which, as the questioner stated, diminish the resources of some for the benefit of others. In that context, I believe that I was stating that laws such as the tax code are constitutional.

7. **You argue that society must define “economic liberty” and decide “what goods are entitled to the statutes of secured entitlement.”**
- a. **Please define what you mean by “economic liberty”?**

Response: As noted above, I do not have a current recollection of what I meant. Reading the transcript, it appears to me that I meant the ability to control and use one’s property without government regulation.

- b. **What role does “economic liberty” play in your legal interpretation of matters regarding both economic and non-economic rights?**

Response: I do not think the definition of economic liberty would play any role in legal interpretation.

- c. **What economic rights, in your view, should be diminished?**

Response: As noted above, I do not have a current recollection of this panel session, and I do not have a general view on this topic. Reading the transcript, I believe that we were discussing the constitutionality of regulation of economic rights such as freedom of contract as interpreted during the *Lochner* era. Any personal views I might have about economic rights would not be relevant to or affect any legal analysis I would provide if I were confirmed as Assistant Attorney General for the OLC.

**8. You also said in *Congress and the Court* that you are not an “originalist.”**

**a. How do you define “originalism”?**

Response: As noted above, I do not have a current recollection of this panel session. Reading the transcript, I believe that in the context of this discussion of judicial power to review legislation affecting economic rights, I was using the term to refer to the belief that the Constitution requires the *Lochner* era view of contractual freedom and property rights. I do not think that this is the common use of the term. I believe it is generally used to refer to a belief that all provisions of the Constitution have their original meaning, that is, their meaning at the time of the framing.

**b. What specific aspects of originalism do you reject?**

Response: I do not have an overall interpretive framework of the Constitution. In my work, I generally confront questions of constitutional interpretation in the context of a single constitutional provision and a particular concrete problem. In that setting, I focus not only on the constitutional text and structure and the Framers’ intent, but also on relevant Supreme Court precedent and the other materials that the Supreme Court had deemed relevant to interpreting the particular constitutional provision at issue.

**c. If you are not an originalist, to what method of constitutional interpretation do you ascribe?**

Response: As described in b. above, I would use the traditional method of construction. I would first consider the constitutional text and structure and the Framers’ intent, and I would then look to Supreme Court precedent addressing the relevant constitutional provision and consider all other materials that the Supreme Court had deemed relevant to interpreting the particular constitutional provision at issue. If I were confirmed, in my role at OLC, I would also consider Executive branch precedent interpreting the relevant constitutional provision.

**9. What methods of interpretation and resources will you use as authoritative sources for your legal opinions as the Assistant Attorney General?**

Response: I would use the traditional method of interpretation and the resources described in my response to 8.c. above.

**10. In 2008, Attorney General Holder gave an address at a convention for the American Constitution Society, assuring young lawyers that America would “soon be run by progressives.” He encouraged them to get involved in ACS, telling them that the administration would be “looking for people who share our values...and a substantial number of those people” are going to be “members of the ACS.” Including yourself and President Obama’s first nominee to lead the Office of Legal Counsel, Dawn Johnsen, quite a number of ACS members have been nominated to judicial vacancies, and high ranking positions within the Administration.**

**a. Considering that you are a member of the American Constitution Society, do you support the sentiment expressed by Attorney General Holder’s statement regarding the hiring of ACS members?**

Response: I am not familiar with Attorney General Holder’s speech and am not sure what he intended by his comment. However, if I were to make hiring decisions at OLC, I would consider traditional merits-based criteria in doing so, and I would not consider membership in ACS or the absence of membership in ACS as relevant to a hiring decision.

**b. As a current member of ACS, will you be able to separate your personal political beliefs from your obligations to fulfill the duties of the Office of Legal Counsel?**

Response: Yes. I fully understand that my personal political beliefs must play no role in fulfilling the duties of OLC.

**11. Despite your impressive professional record, you have no experience with matters involving national security and very little background with criminal issues. The OLC handles some of the most complex and obscure legal questions on matters of national security. What aspect(s) of your record prepares you to address questions regarding national security?**

Response: In my twenty-five years of private practice, I have had the opportunity to work on many cases involving complex and difficult constitutional and statutory issues. I understand that the skills and the judgment that result from that extensive experience in constitutional and federal statutory litigation and analysis are directly analogous to the skills and judgment required to provide excellent legal advice on the issues that arise in the national security setting. In addition, I have substantial experience as an appellate generalist in quickly mastering new areas of law and in working with subject-matter experts to ensure that that I fully understand all aspects of complex issues that I must address in briefing and arguing an appeal. These skills, too, will be useful in interacting with the national security components at the Department of Justice and with other agencies and in addressing the array of legal issues involving national security that arise

at OLC. Finally, I am comfortable working with teams of individuals who bring different skills to the table in addressing complex legal issues. The attorney-advisers and deputies at OLC have substantial subject matter expertise in all relevant national security areas, and OLC's policies and practices ensure a team approach to analysis of the important legal issues that come before it.

**12. Please describe with particularity the process by which these questions were answered.**

I did a complete first draft of answers to these questions. I then discussed the draft with a representative of the Department of Justice. I then prepared a final draft of my answers and forwarded them to the Department. I understand that the Department will submit my answers to the Committee.

**13. Do these answers reflect your true and personal views?**

Yes.

Responses to Senator Jeff Sessions'  
Questions for the Record  
To Virginia Seitz

1. In his book *The Terror Presidency*, Jack Goldsmith writes that the Office of Legal Counsel has a tradition akin to *stare decisis* regarding prior opinions from the Office. Mr. Goldsmith states: “If OLC overruled every prior decision that its new leader disagreed with, its decisions would be more the whim of individuals than the command of impersonal laws.” Likewise, “[c]onstant reevaluation of prior OLC decisions would make it hard for OLC’s many clients to rely on its decisions.”

- a. Do you agree with Mr. Goldsmith that OLC decisions are based on a tradition of *stare decisis*?

Response: I agree with Mr. Goldsmith that OLC has a tradition akin to *stare decisis* regarding prior opinions of the Office. OLC’s *Best Practices for OLC Legal Advice and Written Opinions*, dated July 16, 2010, states that “OLC opinions should consider and ordinarily give great weight to any relevant past opinions of Attorneys General and the Office. The Office should not lightly depart from such past decisions, particularly where they directly address and decide a point in question, but as with any system of precedent, past decisions may be subject to reconsideration and withdrawal in appropriate cases and through appropriate processes.”

- b. If confirmed, do you commit to abide by OLC’s tradition of treating prior decisions as precedent akin to *stare decisis*?

Response: Yes, if confirmed, I will abide by OLC’s tradition and its *Best Practices* in the treatment of prior decisions.

2. On April 1, 2009, the *Washington Post* reported that OLC issued a legal opinion that the D.C. voting rights legislation being considered by Congress was unconstitutional. The story further stated that, upon getting this legal opinion, Attorney General Holder sought an alternative opinion from the Solicitor General’s office. According to the story, lawyers in the Solicitor General’s office “told [Attorney General Holder] that they could defend the legislation if it were challenged after its enactment.”

In contrast, the previous head of OLC, Jack Goldsmith, as well as others within the Department, including the Deputy Attorney General, threatened to resign when others in the administration tried to overrule his judgment that certain aspects of a surveillance program were contrary to the law or were unconstitutional.

If you think an administration prerogative is unconstitutional or illegal, will you sit silently by while the Attorney General or President override your decision on policy grounds or will you take the position that Jack Goldsmith took?

Response: If I were to conclude that an administration action being contemplated is unconstitutional or unlawful, I would not sit silently by. Although I have read public accounts of the events described in the question, I am not familiar with the underlying circumstances of Mr. Goldsmith's threat to resign. And, although I would not consider every good faith, reasonable disagreement about any legal issue grounds for resignation, I agree that resignation is appropriate where legal advice is overruled or disregarded based on improper or irrelevant considerations or for an improper purpose.

3. **Two of the former deputies within OLC, Marty Lederman and David Barron, published two articles in the January 2008 *Harvard Law Review* in which they questioned the exclusivity of the President's Commander in Chief powers relative to the legislature. In their articles, they expressly rejected as "unwarranted" the "view expressed by most contemporary war scholars – namely that our constitutional tradition has long established that the Commander in Chief enjoys substantive powers that are preclusive of congressional control, especially with respect to the command of forces and the conduct of [military] campaigns[.]"**

**President Obama has been criticized for not seeking Congressional authorization before engaging in Libya. Former Assistant Attorney General for OLC Jack Goldsmith recently wrote that the President is acting constitutionally.**

- a. **Do you agree with Mr. Barron and Mr. Lederman that the Executive's powers are limited in this case, or do you agree with Mr. Goldsmith?**

Response: The articles written by Mr. Barron and Mr. Lederman are complex and lengthy. They were written before the President's action in Libya, and I am not confident that the authors would disagree with Mr. Goldsmith's analysis with respect to Libya. Mr. Goldsmith's analysis, too, rests on numerous sources which I have not studied. The question of the constitutional limits on the President's authority to engage in Libya is complex and fact-intensive. It involves the analysis of numerous factors, including the scope, nature and duration of the U.S. engagement and the relevant U.S. interests, as well as an analysis of a substantial body of law, including public and nonpublic decisions of Attorneys General and OLC. OLC published an opinion on this question entitled *Authority to Use Force in Libya*, dated April 1, 2011. If I were to receive a similar question at OLC, I would follow the traditional OLC policies and practices in responding, including researching the relevant facts and law and engaging in consultations with other Department of Justice components and with other agencies with relevant interests.

- b. **Do you agree with Mr. Barron and Mr. Lederman's rejection of "the argument that tactical matters [in wartime] are for the President alone[?]?"**

Response: The scope of the President's unilateral authority over tactical matters in wartime would depend in significant part on the breadth of the writer's definition of what is "tactical." I agree that there are many cases in which

Congress does not have sufficient information or speed to regulate military tactics in the midst of armed conflict; and, indeed, it is my understanding that Congress does not often try to do so.

- c. **Do you believe Congress has the constitutional authority to prescribe legislatively the military's tactics during wartime?**

Response: My response is contained in subpart b. above.

- d. **Setting aside the constitutional considerations, do you believe Congress has the ability – both in terms of information and nimbleness – to legislate tactics during a military campaign?**

Response: First, and importantly, if constitutional or other legal considerations are set aside, the question becomes one of policy and thus would not fall in the province of OLC. Second, I am not familiar with examples of congressional legislation of tactics during a military campaign. Finally, as noted above, while the scope of Congress's authority would depend in significant part on the breadth of the writer's definition of what is "tactical," I agree that Congress generally lacks the information and nimbleness to legislate tactics during a military campaign.

4. **Mr. Barron and Mr. Lederman conclude their second article, *The Commander in Chief at the Lowest Ebb – A Constitutional History*, with advice to future Executive Branch lawyers. They write that such lawyers "should resist the urge to continue to press the new and troubling claim that the President is entitled to unfettered discretion in the conduct of war." Do you believe that, if confirmed, you should resist the urge to give President Obama discretion to conduct military operations in Libya, for example?**

Response: As noted above, I am not confident I can discern these authors' position on the President's conduct of military operations in Libya. In this regard, however, I note that I agree with a statement by Steve Bradbury in an OLC memorandum that, although the President has broad authority as Commander in Chief to take military actions, Article I, section 8 of the Constitution grants Congress significant war powers as well. See *Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001* (Jan. 15, 2009), which is available at <http://www.usdoj.gov/opa/documents/memostatusolcopinions01152009.pdf>. The scope of the President's broad discretion as Commander in Chief to conduct military operations would have to be addressed in a concrete setting, considering all relevant facts and circumstances, as set forth in the response to question 3.a.

5. **In 1993, you participated in a panel discussion that was published in the *Cumberland Law Review*. During that discussion, you argued that, in order to achieve the "optimal nation," "redistribution" of economic rights is necessary in order for all to achieve a minimum level of assets so that individuals are truly able**

to exercise their non-economic rights. In response to a question from the audience, you acknowledged that the rights of those from whom resources are taken would be diminished, but said that this would not be a problem because you do not see economic rights as “the kind of undivided whole in which every cent you have is your right.” However, I believe as F.A. Hayek explained, that “Economic control is not merely control of a sector of human life which can be separated from the rest; it is the control of the means for all our ends. And whoever has sole control of the means must also determine which ends are to be served, which values are to be rated higher and which lower – in short, what men should believe and strive for.”

- a. **Do you think the kind of control Hayek describes—the kind of control you seemed to be advocating—is consistent with the founding generation’s concept of liberty, as protected by the Constitution?**

Response: The panel which the question references took place in 1993. I was asked to participate because I had been one of the attorneys representing the AFL-CIO in several cases involving economic rights such as the property clause and the contracts clause, and I was speaking from that perspective. I am not familiar with the passage from Hayek that is quoted in the question and not confident that I grasp his meaning. Reading the transcript of the question and answer session, I believe that I was discussing the constitutionality of federal laws regulating economic rights and interests and expressing the view that such government regulation may be constitutional even if it affects economic interests. For example, I believe my answer quoted above was responding to a question about the lawfulness of taxes and tax increases which, as the questioner stated, diminish the resources of some for the benefit of others. In that context, I believe that I was stating that laws such as the tax code are constitutional, and I believe that this is true.

- b. **At another point in the discussion, you justified your view by saying**

**“I do not know exactly how much economic liberty is essential to the preservation of other liberties that I consider more fundamental, but I am not persuaded that the required amount of economic liberty is the same as was present in eighteenth-century America. Property and contract rights have been redefined in many different ways since the founding, most notably in the eighteenth century when significant changes occurred to make the Industrial Revolution possible.”**

- i. **Do you believe that the meaning of the Constitution can be altered by changing laws and norms over time?**

Response: As noted above, the panel occurred in 1993 and I do not recall the session. Reading the transcript, I believe that in the statement quoted in the question, I was not describing my views about the correct framework for constitutional interpretation; I was simply agreeing that economic liberty is essential to our system of government and posing the question of how much liberty (freedom from regulation) is essential. I was also stating that government

regulation of the economy has increased since the time of the Founding, and that we had maintained both property and contract rights and other kinds of rights. The Supreme Court's interpretation of the Constitution's liberty and due process provisions and their application to government regulation has changed over time. This is seen in comparing the Supreme Court's decisions in the *Lochner* era with those in the post-*Lochner* era. I do not believe, however, that changes in laws have changed the meaning of the Constitution; instead, the Supreme Court altered its interpretation of the relevant provisions. If I were confirmed, in addressing the constitutional issues before OLC, I would apply the Supreme Court's interpretation and application of the relevant constitutional provision.

- ii. **Would this same logic apply to noneconomic rights? For example, if all the states and the federal government passed a law that said that no individual's right to privacy or right to be free of unreasonable searches and seizures extended to their library records, would that be subject to judicial decision-making to determine if that right was "essential to the preservation of other liberties"?**

Response: As stated above, I do not believe that my statement was setting forth a framework for constitutional analysis. And, I do not believe that the mere fact that all states have enacted a law changes the meaning of the Constitution, whether that law addresses economic or noneconomic rights. Instead, the Supreme Court would decide the constitutionality of any such law using its traditional method, that is, analyzing the constitutional text and structure, the Framers' intent and its relevant precedent.

**Senator Chuck Grassley**  
**Questions for the Record**  
**Donald Verrilli, Solicitor General of the United States**

1. As you said at your hearing, you were recused from the internal discussions regarding the Administration's decision to abandon its defense of the Defense of Marriage Act. Because you were recused, no privilege applies. You also acknowledged your duty to vigorously defend statutes duly enacted by the Congress, except under two very narrow and exceedingly rare circumstances. The first is where the Executive believes the statute infringes on the power of the President. The second, as you correctly noted, is where "there is no reasonable argument that can be advanced in defense of the statute." You are an accomplished and well respected Supreme Court practitioner, and the nominee for Solicitor General of the United States. Please take whatever time you need to study the issue, and answer the following question: Do you believe "there is no reasonable argument that can be advanced in defense" of the Defense of Marriage Act (DOMA)?

ANSWER

The Attorney General's February 23, 2011 letter to Speaker Boehner pursuant to 28 U.S.C. § 530D concluded that "classifications based on sexual orientation should be subject to a heightened standard of scrutiny," and based on that conclusion I believe that the Attorney General concluded that there were not reasonable arguments to be made in the defense of Section 3 of DOMA. The letter also stated that "[i]f asked by the district courts in the Second Circuit for the position of the United States in the event those courts determine that the applicable standard is rational basis, the Department will state that, consistent with the position it has taken in prior cases, a reasonable argument for Section 3's constitutionality may be proffered under that permissive standard." Because I was recused from any consideration of the government's position on DOMA, I did not participate in any internal Department of Justice deliberations or inter-agency deliberations within the Executive Branch regarding whether reasonable arguments could be advanced in defense of the constitutionality of Section 3 of DOMA. Participation in such discussions and deliberations would be essential to developing a fully informed view on the question of whether Section 3 could be defended under the Department of Justice's traditional standards. With that caveat, I can say that, consistent with the Attorney General's statement and despite my necessarily incomplete understanding of the legal issues, reasonable arguments can be advanced that Section 3 of DOMA has a rational basis under the deferential rational basis standard of review.

2. You indicated at your hearing that the President and the Attorney General had already made the decision with respect to DOMA, suggesting you will be absolved of your responsibility to independently assess the validity of that decision. But of course, should DOMA reach the Supreme Court, you will have an independent responsibility as Solicitor General of the United States to decide whether a "reasonable argument [] can be advanced" in its defense. Please take whatever time you need to study the issue, and answer the following questions:

- a. If the Defense of Marriage Act reaches the Supreme Court of the United States, will you vigorously defend it?
- b. If you will not, why not?
- c. If you will, on what basis will you do so?

ANSWER (to Questions 2a, 2b and 2c)

I appreciate the opportunity to address this point, which requires a broader answer that describes the nature of the independent judgment a Solicitor General exercises and the relationship between the Solicitor General and the Attorney General. With respect to Section 3 of the Defense of Marriage Act, the President and the Attorney General have concluded that heightened equal protection scrutiny applies and that no reasonable argument can be made in defense of its constitutionality. They therefore have instructed the Department of Justice not to defend the statute. As I stated at the hearing, although I did not participate in these decisions, I am confident, based on my experience working for this Attorney General and this President, that the decisions were made with appropriate recognition of the gravity of the issue, were made in good faith, and were made on the law. The moment of that decision is past. Should the issue reach the Supreme Court in the future, for the reasons set forth below, I do not believe any Solicitor General – whether he or she had participated in the initial evaluation or arrived in office after that decision was made – would have the authority to file a brief in the Supreme Court defending the constitutionality of Section 3, unless the decision by the President and the Attorney General not to defend were reconsidered based on intervening changes in the law. Whatever my independent judgment on the issue might have been had I occupied the Office of the Solicitor General at the time, the President and the Attorney General have already made this particular decision.

If confirmed as Solicitor General, I will adhere to the vitally important traditions of the Office and exercise my independent judgment regarding the defense of statutes and all other matters. I expect that the President and the Attorney General will respect that independent judgment (and, as set forth in response to Question 3 below, I am prepared to resign if they overrule my decision based on partisan political considerations or other illegitimate reasons, or on an indefensible view of the law). The question of exactly what the Solicitor General's independence consists of is one on which many former Solicitors General, lawyers in the Office of the Solicitor General, and scholars have expressed a variety of opinions. For me, it means the following: The Solicitor General decides what the position of the United States will be in litigation within the Solicitor General's purview based on the law and on the Solicitor General's best judgment of what is in the long-term institutional interests of the United States – partisan political considerations must play absolutely no role. That is true for all decisions a Solicitor General makes, and is certainly true for the decision whether reasonable arguments exist to defend an act of Congress. Therefore, if confirmed, I will exercise independent judgment to decide that statutes should be defended unless they fall into one of the two narrow and traditionally recognized exceptions – where a statute violates the separation of powers by infringing on the President's constitutional authority, or where there are no reasonable arguments that can be offered in its defense.

Attorneys General and Presidents have come to appreciate the importance of affording the Solicitor General the ability to make independent judgments based on the law and the long-term institutional interests of the United States. This exercise of independent judgment allows the Solicitor General's Office – in the words of Rex Lee – to “provide the Court from one administration to another – and largely without regard to either the political party or the personality of the particular Solicitor General – with advocacy which is more objective, more competent, and more respectful of the Court as an institution than it gets from any other group of lawyers.” Independence thus allows the Solicitor General to fulfill his or her responsibilities as an officer of the Supreme Court. At the same time, the reservoir of credibility that such advocacy builds up will serve the interests of any President and any administration in achieving its overall objectives, even if an administration must forgo taking a position that might advance a particular administration objective in a particular case. This independence also fosters respect for Congress as a co-equal branch of government. Finally, it will always benefit the Attorney General and the President to receive the independent and expert legal judgment of the Solicitor General to mark the boundaries of what the law will allow, and ensure that an administration's legal policy objectives are achieved in fidelity to the rule of law.

As critically important as the exercise of independent legal judgment is to the proper functioning of the Office of the Solicitor General, the Solicitor General does not exercise independence in the sense of having the legal authority to make the final call on the positions the United States will take in court. As many previous nominees have recognized in their testimony before this Committee (and as I describe in more detail in my response to Question 11 below), the Solicitor General exercises independence within a framework that recognizes the ultimate authority of the Attorney General (and the President) – an authority rarely exercised – to decide what position the United States will take in court.<sup>1</sup> Robert Bork put it this way: “I would like to point out that the Solicitor General has the degree of freedom that he does have by custom and tradition really on condition that he not abuse it. By law he is under the Attorney General's direction so that there is the fact that the discretion that the Solicitor General has, I think, is reposed only because it is understood that he will not abuse it.” Charles Fried testified that: “The statutes and regulations which set out the Office of the Solicitor General plainly indicate that the Solicitor General is a subordinate official of the Attorney General” and that “the way in which the Solicitor General serves the Attorney General is by giving his own best independent judgment. Now the Attorney General does not have to accept that judgment. He has got to make his own judgments, and that means that there will be occasions – there always have been and there will continue to be – on which the Attorney General, in rare cases, concludes that the judgment that his Solicitor General

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<sup>1</sup> The relevant provisions of the U.S. Code make clear that the authority to control the litigation of the United States, including litigation in the Supreme Court, rests in the hands of the Attorney General. See 28 U.S.C. § 516 (“the conduct of litigation in which the United States, an agency or an officer thereof is a party, or is interested, . . . is reserved to the officers of the Department of Justice, under the direction of the Attorney General”); 28 U.S.C. § 518(a) (“Except when the Attorney General in particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suit in the Court of Claims in which the United States is interested.”); 28 U.S.C. § 518(b) (“When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States”); 28 U.S.C. § 519 (“Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency or an officer thereof is a party”). The Attorney General has, by regulation, delegated to the Solicitor General the authority to conduct the litigation of the United States in the Supreme Court. See 28 C.F.R. § 0.20 (2010).

has given him is a judgment with which he does not concur, and in that event, he has the clear statutory authority to direct the Solicitor General to take a contrary position. There is no doubt about that.” Kenneth Starr recognized that “the Attorney General retains responsibility for and ultimate direction of the Government’s arguments before the courts.” Seth Waxman explained it this way: “[I]t is my decision, unless I am overruled by a higher authority, to take an independent look and determine, A, whether it is constitutionally permissible to advocate that policy, and, B, where and when it is desirable to do so. And those are my independent responsibilities, as I understand it, and I am very confident that the President expects me to exercise that independent responsibility.” Paul Clement likewise acknowledged that “the Attorney General and the President . . . certainly have the power to overrule the Solicitor General.” He also stated that: “In those rare matters of such sufficient moment to come to the attention of the Attorney General, if the Attorney General reaches a different conclusion [from the Solicitor General], the most important thing is for the Solicitor General to have an opportunity to discuss the matter in an effort to reach agreement. In the event agreement cannot be reached, the Attorney General and ultimately the President have the final call.” The Supreme Court has also recognized that Congress has “vest[ed] the conduct of litigation before this Court in the Attorney General, an authority which has by rule and tradition been delegated to the Solicitor General.” *Federal Election Commission v. NRA Political Victory Fund*, 513 U.S. 88, 96 (1994). I agree with these views, and I believe they reflect the same view you stated at the hearing to consider Kenneth Starr’s nomination for Solicitor General: “it is important for us to keep in mind that the holder of this post serves at the pleasure of the President of the United States. By Constitution and statute, he owes his allegiance to the Executive Branch. As an officer of the Executive Branch, the Solicitor General exercises authority only as delegated by the Attorney General.” Therefore, as I explain more fully below, if I were confirmed as Solicitor General I would have no authority to revisit the President’s decision on DOMA or any other matter.

3. If, in your judgment, there is a “reasonable argument that can be advanced” in defense of a particular statute, but the Attorney General nonetheless instructs you not to defend it, what will you do?

ANSWER

I appreciate the opportunity to clarify my testimony on this point. As I tried to convey in my testimony at the hearing on March 30<sup>th</sup>, if I were instructed by my superiors not to defend a statute, I could not defy that instruction and proceed with the defense of the statute. The Solicitor General lacks any such authority. As Charles Fried testified during his confirmation hearing (and as I addressed more fully in response to Question 2 above), “[t]he statutes and regulations which set out the Office of the Solicitor General plainly indicate that the Solicitor General is a subordinate official of the Attorney General” and the Attorney General “has the clear statutory authority to direct the Solicitor General to take a contrary position” to the position the Solicitor General would take in the exercise of his or her own independent judgment. Disregarding such a command would be insubordination and would itself violate the rule of law.

But I did not mean to suggest that I would carry out an order despite my conviction that doing so was wrong. I would not lend my name or that of the Office of the Solicitor General to carrying

out an order that I believed to be based on partisan political considerations or other illegitimate reasons, or an indefensible view of the law, and would certainly resign rather than carry out the order. If I were to explain to the Attorney General that I believed reasonable grounds existed to defend a statute and that I would not be able to carry out an order to cease defending the statute, I would expect that he would respect my judgment. But I would resign if he did not.

4. If, in your judgment, there is a “reasonable argument that can be advanced” in defense of a particular statute, but the President nonetheless instructs you not to defend it, what will you do?

ANSWER

The Solicitor General’s independent judgment is also subject to being overruled by the President. If the President instructed the Department of Justice not to defend a federal statute in the Supreme Court, the Solicitor General (as a subordinate officer) could not disobey or disregard that command. But I would not lend my name or that of the Office of the Solicitor General to carrying out an order that I believed to be based on partisan political considerations or other illegitimate reasons, or an indefensible view of the law, and would certainly resign rather than carry out the order. If I were to explain to the President that I believed reasonable grounds existed to defend a statute and that I would not be able to carry out an order to cease defending the statute, I would expect that he would respect my judgment. But I would resign if he did not.

5. At your hearing, you told Senator Hatch, “I think the longstanding tradition of the Department of Justice is to defend statutes so long as there is a reasonable argument to be made in their defense.” Please explain in detail how you define “reasonable argument”?

ANSWER

I understand that, in making judgments about whether reasonable arguments exist to defend the constitutionality of a federal statute, the Department of Justice applies a strong presumption that the statute is constitutional, in recognition of the respect due to a co-equal branch of government, and in light of the presumption that the President who signed the bill agreed that it was constitutional. The Department’s reasonableness standard is difficult to quantify with mathematical precision. An argument the Department puts forward in defense of the constitutionality of a statute must meet the high standards of candor, professionalism, and respect for precedent that the Department expects of its lawyers in all matters. For example, a lawyer in private practice might, consistent with the Rule 11 obligation not to advance a frivolous argument, argue that a statute is constitutional on the ground that the Supreme Court precedent calling its constitutionality into doubt should be overruled. But a lawyer for the Department of Justice is not free, in the same sense that private counsel might be, to advance such an argument no matter the circumstances; the Department’s special obligation to respect the principle of *stare decisis* imposes constraints that private counsel would not face. In addition, in making such judgments, the Department must consider not merely the particular case at hand but also the long-term interests of the United States, and the Department may therefore need to forbear from

advancing a particular argument in one case because of the negative implications for the interests of the United States in other cases. Paul Clement's testimony on this issue at his confirmation hearing illustrates the general point. In explaining the decision not to defend the statute at issue in *ACLU v. Mineta*, which is discussed more fully in response to Question 103(s) below, he stated that "we actually could conceive of an argument to defend the statute," but that it simply did not pass muster under the Department's standards. Similarly, in *Metro Broadcasting, Inc. v. FCC*, the Solicitor General's Office not only refused to defend, but affirmatively attacked, the constitutionality of the federal statute at issue; and in *Turner Broadcasting Inc. v. FCC*, the Justice Department declined to defend a statute at the district court level based upon a conclusion that a constitutional defense could not reasonably be mounted. In both of those cases, the Supreme Court ultimately upheld the statutory provisions. Cases like these demonstrate, at a minimum, that dedicated and skilled lawyers, acting in good faith, can and sometimes do differ over whether reasonable arguments can be made in defense of a statute.

6. Has any individual within the Administration, either prior to or following your nomination, asked you for your views regarding the Defense of Marriage Act? If so, please provide the details, including what was asked, when, by whom, and how you responded.

ANSWER

No.

7. Has any individual within the Administration, either prior to or following your nomination, asked you whether you will defend the Defense of Marriage Act if confirmed? If so, please provide the details, including what was asked, when, by whom, and how you responded.

ANSWER

No.

8. At your hearing, I asked you whether you would defend Section 2 of the Defense of Marriage Act, which permits states to choose whether or not to recognize same-sex marriages from other states. You responded that you have been recused and therefore "have not given any specific consideration to that issue," but that you would "apply the appropriate and traditional standards" in answering that question. Please take whatever time necessary, and answer the following question: If Section 2 of the Defense of Marriage Act is challenged in the Supreme Court, will you vigorously defend it?

ANSWER

If confirmed, I will adhere to the traditions of the Solicitor General's Office and exercise my independent judgment regarding all the legal matters that come before me, including the defense of statutes. Assuming that Section 2 of DOMA does not violate the separation of powers, the question would be whether reasonable arguments could be made in its defense. (The Attorney General's 28 U.S.C. § 530D letter addresses only Section 3 of DOMA.) Because I was recused from litigation involving DOMA, I have given no previous consideration to the question of the constitutionality of any provision of DOMA. Also, I did not participate in any internal Department of Justice deliberations or inter-agency deliberations within the Executive Branch regarding whether reasonable arguments could be advanced in defense of the constitutionality of any provisions of DOMA. Those deliberations would be crucial to inform my understanding of the issues, including the federal interests at stake, and my judgment about whether reasonable arguments can be made. What I can say is that Section 2 is entitled to a strong presumption of constitutionality, and my provisional view is therefore that a reasonable argument could be advanced in defense of that provision, in light of existing Supreme Court authority. Before making a decision on the question as Solicitor General, however, I would need to give the issue the full consideration it deserves, which would include extensive deliberations with lawyers in the Department of Justice and with Executive Branch departments and agencies that have an interest in the matter – as I understand the Solicitor General's Office does with respect to any matter of significance.

9. At your hearing, Senator Whitehouse said that you will not need to assess whether to defend DOMA because "this is a decision that will [not] be before him in his career because it has already been made. This decision has been taken." You appeared to agree. You said you would apply the traditional Justice Department standards, "to the extent it has not already been decided by the President and the Attorney General."
  - a. If a challenge to DOMA reaches the Supreme Court, do you believe that you will have an independent obligation to consider whether there is a reasonable argument to be made in its defense?

ANSWER

Please see my answer to Question 2 above, which I believe answers this question.

- b. Alternatively, should DOMA reach the Supreme Court, do you believe the President's decision, embodied in the Attorney General's letter to Speaker Boehner, would preclude you from making an independent judgment on the issue?

ANSWER

Please see my answer to Question 2 above, which I believe answers this question.

10. Do you believe there is a federal constitutional right to same-sex marriage?

ANSWER

The Supreme Court has not recognized a constitutional right to same-sex marriage. If I am confirmed, whatever personal views I might have respecting any legal issue will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

11. In response to a question from Senator Hatch, referring to the decision to decline to defend a statute, you said, "at the end of the day, the Solicitor General works for the Attorney General, who works for the President, and, therefore, the Attorney General or the President can issue a direction of that kind." You also told Senator Hatch, "Senator, I would defend the statute unless instructed by my superior not to do so." I am concerned that you do not fully appreciate the extent to which the Office of Solicitor General must remain independent from both the Attorney General and the President.
- a. Please explain your understanding of the difference between the role of Attorney General and Solicitor General.

ANSWER

I appreciate the opportunity to address this question, which touches on the vital importance of the independent judgment a Solicitor General must exercise to discharge the responsibilities of the Office, and on the relationship between the Solicitor General and the Attorney General.

By long tradition, the Solicitor General has been afforded a great measure of independence in carrying out the functions of the Office, in recognition that the exercise of that independent legal judgment in the long run best serves the interests of the Executive Branch, as well as the Congress and the Supreme Court. The question of exactly what the Solicitor General's independence consists of is one on which many former Solicitors General, lawyers in the Office of the Solicitor General, and scholars have expressed a variety of opinions. For me, it means the following: The Solicitor General decides what the position of the United States will be in litigation within the Solicitor General's purview based on the law and on the Solicitor General's best judgment of what is in the long-term institutional interests of the United States – partisan considerations must play absolutely no role in the Solicitor General's judgments. That is true for all decisions a Solicitor General makes, and is certainly true for judgments about whether reasonable arguments exist to defend an act of Congress.

Attorneys General and Presidents have come to appreciate the importance of affording the Solicitor General the ability to make independent judgments based on the law and the long-term

institutional interests of the United States. This exercise of independent judgment allows the Solicitor General's Office -- in the words of Rex Lee -- to "provide the Court from one administration to another -- and largely without regard to either the political party or the personality of the particular Solicitor General -- with advocacy which is more objective, more competent, and more respectful of the Court as an institution than it gets from any other group of lawyers." Independence thus allows the Solicitor General to fulfill his or her responsibilities as an officer of the Supreme Court. At the same time, the reservoir of credibility that such advocacy builds up will serve the interests of any President and any administration in achieving its overall objectives, even if an administration must forgo taking a position that might advance a particular administration objective in a particular case. This independence also fosters respect for Congress as a co-equal branch of government. Finally, it will always benefit the Attorney General and the President to receive the independent and expert legal judgment of the Solicitor General to mark the boundaries of what the law will allow, and ensure that an administration's legal policy objectives are achieved in fidelity to the rule of law.

As critically important as the exercise of independent legal judgment is to the proper functioning of the Office of the Solicitor General, the Solicitor General does not exercise independence in the sense of having the legal authority to make the final call on the positions the United States will take in court. In the overwhelming majority of instances, the Solicitor General does make the final call because the Attorney General and the President respect the Solicitor General's independent judgment and do not seek to intervene. But the Attorney General (and the President, as the Attorney General's superior) do have the legal authority to overrule the Solicitor General's independent judgment about what the litigation position of the United States should be. *See* 1 Op. O.L.C. 228, 230 (1977) ("Under the relevant statutes . . . the Attorney General retains the right to assume the Solicitor General's function himself.") As Charles Fried recognized in his testimony before this Committee, "there will be occasions -- there always have been and there will continue to be -- on which the Attorney General, in rare cases, concludes that the judgment his Solicitor General has given him is a judgment with which he does not concur, and in that event he has the clear statutory authority to direct the Solicitor General to take a contrary position."

Throughout our nation's history, Congress has vested in the Attorney General the power to control what position the United States will take in court. The Judiciary Act of 1789, which created the office of Attorney General, provided that: "there shall . . . be appointed a . . . person, learned in the law, to act as attorney-general for the United States, . . . *whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned* and to give his advice and opinion upon questions of law when required by the President of the United States or when requested by the heads of any of the departments, touching any matters that may concern their departments." Act of Sept. 24, 1789, ch. 20 § 35, 1 Stat. 73, 93 (emphasis added). Subsequent Judiciary Acts have expanded and refined the scope of the Attorney General's authority, but that authority has always included control over the positions the United States takes in litigation.

For nearly a century after Congress created the office, the Attorney General remained directly responsible for representing the United States in court. Indeed, the Office of Solicitor General did not exist. As the nation grew and the functions of the Attorney General expanded, it became

impossible for the Attorney General to carry out all of his congressionally assigned functions personally, and the Attorney General therefore often retained private counsel to represent the United States before the Supreme Court and in the lower federal courts – with the result that private counsel were making their own independent, and often inconsistent, judgments regarding what the position of the United States should be in any given case. *See generally* Seth P. Waxman, *Presenting the Case of the United States As It Should Be: The Solicitor General in Historical Context*, 1998 *Journal of Supreme Court History* 3.

To alleviate the burden on the Attorney General, to provide for consistency and uniformity in the positions the United States advanced before the Supreme Court and the lower federal courts, and to save the expense of retaining private counsel, *see Waxman supra*, Congress created the position of Solicitor General in the Judiciary Act of 1870, which also established the Department of Justice. That enactment provided: “that there shall be in said Department [of Justice] an officer learned in the law, to assist the Attorney-General in the performance of his duties, to be called the solicitor-general . . . .” Act of June 22, 1870, ch. CL, § 2, 16 Stat. 162 (emphasis added). As set forth in the current U.S. Code, this provision still states that the role of the Solicitor General is to “assist the Attorney General in the performance of his duties.” 28 U.S.C. § 505 (2006).

The provisions of the U.S. Code currently in effect make clear that the authority to control the litigation of the United States, including litigation in the Supreme Court, rests in the hands of the Attorney General. *See* 28 U.S.C. § 516 (“the conduct of litigation in which the United States, an agency or an officer thereof is a party, or is interested, . . . is reserved to the officers of the Department of Justice, under the direction of the Attorney General”); 28 U.S.C. § 518(a) (“Except when the Attorney General in particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suit in the Court of Claims in which the United States is interested.”); 28 U.S.C. § 518(b) (“When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States”); 28 U.S.C. § 519 (“Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency or an officer thereof is a party”).

To implement this allocation of statutory authority, the Attorney General has promulgated a regulation, 28 C.F.R. § 0.20 (2010), that delegates authority to the Solicitor General and sets forth the responsibilities of the Solicitor General as follows:

The following described matters are assigned to, and shall be conducted by, handled or supervised by, the Solicitor General, in consultation with each agency official concerned:

- (a) Conducting, or assigning and supervising, all Supreme Court cases, including appeals, petitions for and in opposition to certiorari, briefs and arguments, and . . . settlement thereof;
- (b) Determining whether, and to what extent, appeals will be taken by the Government to all appellate courts . . . [:]

(c) Determining whether a brief *amicus curiae* will be filed by the Government, or whether the Government will intervene, in any appellate court [; and]

(d) Assisting the Attorney General, the Deputy Attorney General, and the Associate Attorney General in the development of broad Department program policy.

Thus, as these statutes and regulations establish, the legal authority the Solicitor General exercises is authority that has been delegated by the Attorney General. The Supreme Court has recognized this. For example, in *Federal Election Commission v. NRA Political Victory Fund*, 513 U.S. 88 (1994), the Court explained that 28 U.S.C. § 518 “represents a policy choice by Congress to vest the conduct of litigation before this Court in the Attorney General, an authority which has by rule and tradition been delegated to the Solicitor General.” 513 U.S. at 96. The Supreme Court also explained this point in *United States v. Providence Journal Co.*, 485 U.S. 693, 700 (1988) (noting that the Attorney General possesses the authority under 28 U.S.C. § 518(a) to conduct the litigation of the United States, and that “[t]he Attorney General by regulation has delegated authority to the Solicitor General”).

Many previous nominees have recognized in their testimony before this Committee that the Solicitor General exercises independent judgment within a framework that recognizes that the Solicitor General’s authority is ultimately derivative of the Attorney General’s authority. Robert Bork put it this way: “I would like to point out that the Solicitor General has the degree of freedom that he does have by custom and tradition really on condition that he not abuse it. By law he is under the Attorney General’s direction so that there is the fact that the discretion that the Solicitor General has, I think, is reposed only because it is understood that he will not abuse it.” Charles Fried testified that “[t]he statutes and regulations which set out the Office of the Solicitor General plainly indicate that the Solicitor General is a subordinate official of the Attorney General” and that “the way in which the Solicitor General serves the Attorney General is by giving his own best independent judgment. Now the Attorney General does not have to accept that judgment. He has got to make his own judgments, and that means that there will be occasions – there always have been and there will continue to be – on which the Attorney General, in rare cases, concludes that the judgment that his Solicitor General has given him is a judgment with which he does not concur, and in that event, he has the clear statutory authority to direct the Solicitor General to take a contrary position. There is no doubt about that.” Kenneth Starr, in his written testimony, recognized that “the Attorney General retains responsibility for and ultimate direction of the Government’s arguments before the courts.” Seth Waxman explained it this way: “it is my decision, unless I am overruled by a higher authority, to take an independent look and determine, A, whether it is constitutionally permissible to advocate that policy, and, B, where and when it is desirable to do so. And those are my independent responsibilities, as I understand it, and I am very confident that the President expects me to exercise that independent responsibility.” Paul Clement likewise acknowledged that “the Attorney General and the President . . . certainly have the power to overrule the Solicitor General.” He also stated that: “In those rare matters of such sufficient moment to come to the attention of the Attorney General, if the Attorney General reaches a different conclusion [from the Solicitor General], the most important thing is for the Solicitor General to have an

opportunity to discuss the matter in an effort to reach agreement. In the event agreement cannot be reached, the Attorney General and ultimately the President have the final call.”

As I stated in response to Questions 2 through 4 above, however, there is a critical difference between stating that the Solicitor General is subject to being overruled by the Attorney General or the President, and stating that the Solicitor General has no choice but to carry out an order from the Attorney General or the President. Were I convinced that such an order was based on partisan political considerations or other illegitimate reasons, or on an indefensible view of the law, I would resign rather than carry out the order. I do not expect this situation to arise because I believe the Attorney General and the President will respect my independent judgment. But if the situation does arise, I am prepared to resign.

- b. In what ways is the position of Solicitor General of the United States different from the position of White House Counsel or Deputy White House Counsel?

ANSWER

The Deputy White House Counsel assists the White House Counsel in carrying out the functions of the office. The principal function of the White House Counsel is to serve as lawyer to the President (in his official capacity), to the Executive Office of the President, and to the Presidency in a broader sense.

The Solicitor General is not the President’s lawyer. The Solicitor General represents the United States and its long-term institutional interests. In the most fundamental sense, the Solicitor General’s client is the United States because the Solicitor General must determine what position to take in the Supreme Court on the basis of the long-term institutional interests of the United States as a whole – including the interests of all three branches of government – and not merely the interests of the particular department or agency that is the party in a particular case. In a formal sense, and often in a practical sense as well, the client of the Solicitor General does change from case to case. For example, in one case the party represented by the Solicitor General’s Office may be the Federal Communications Commission and in another case it may be the Secretary of the Interior, or it may be a government official sued in his or her individual capacity in a constitutional tort suit. The particular views of the department or agency that is the party in the case may be entitled to particular weight in formulating the position of the United States in the case.

12. If confirmed, how will you maintain your independence from the President?

ANSWER

If confirmed, I will carry out the responsibilities of the Office as other Solicitors General have done. I will rely on the extraordinarily talented and dedicated career attorneys who carry on the day-to-day work of the Office. I will consult with Executive Branch departments and agencies to determine what position is in the interests of the United States. And I will base my decisions solely on the law and the long-term institutional interests of the United States.

In addition, I believe the President and the Attorney General are best served when they have confidence in the judgment of the Solicitor General and therefore do not intervene in the decisions of the Solicitor General's Office. In what Paul Clement described as "those rare matters of such sufficient moment to come to the attention of the Attorney General" or the President, I would provide the Attorney General or the President with my independent judgment of what the position of the United States should be based on the law and the long-term institutional interests of the United States. If a situation arises in which I believe a contrary position cannot be supported under the law, I will say so, and I will make clear that I will resign rather than carry out an instruction that I believe is based on partisan political considerations or other illegitimate reasons, or an indefensible view of the law. I would expect that they would respect my judgment. But I am prepared to resign if they do not.

13. What weight should the Attorney General give to political considerations in making a decision whether or not to defend a statute?

ANSWER

In my judgment, partisan political considerations should play no role in making a decision whether or not to defend a statute.

14. What weight should the President give to political considerations in deciding whether or not to defend a statute?

ANSWER

In my judgment, partisan political considerations should play no role in deciding whether or not to defend a statute.

15. What weight should the Solicitor General give to political considerations in deciding whether or not to defend a statute?

ANSWER

If I am confirmed, partisan political considerations will play no role in my decisions whether or not to defend statutes.

16. Please identify any duly enacted federal statutes currently in effect that you believe cannot reasonably be defended before the Supreme Court.

ANSWER

If I am confirmed, it will be no part of my responsibility as Solicitor General to search for provisions in the U.S. Code that might be unconstitutional. To the contrary, it will be my responsibility to defend federal statutes against constitutional challenge, subject only to the two narrow and rarely invoked exceptions, as explained in my responses to Questions 1 and 4 above. As Seth Waxman explained, the Solicitor General's Office plays a "reactive" role. *Rex E. Lee Conference on the Office of the Solicitor General of the United States: Panel for Former Solicitors General*, 2003 B.Y.U. L. Rev. 153, 173 (2003)

- a. Have you had any discussions with anyone within the Administration, including but not limited to the Attorney General or the President, regarding these statutes?

ANSWER

No.

17. You have strong views when it comes to the death penalty. You have represented death-row inmates before the Supreme Court in more than a dozen cases. The federal government, of course, imposes the death penalty in certain circumstances. If the federal death penalty is challenged in the Supreme Court, will you vigorously defend the statute?

ANSWER

Yes. In *Gregg v. Georgia* in 1976, the Supreme Court held that capital punishment is constitutional. *Gregg* and its progeny have remained the law for more than 30 years, and if confirmed, that is the law that I will follow in carrying out the obligations of the Office. I will vigorously defend the statute. Consistent with my obligation to act in the long-term institutional interest of the United States, I will make decisions regarding this and all other issues based on the facts and the law, including the settled law of *Gregg* and its progeny.

18. The vigorous defense of a statute is not limited to merely filing a brief in its support. For instance, as you well know, decisions regarding which cases to appeal (and when) may significantly impact the defense of a statute. Do you pledge not to undermine in any way any statute for which there is a reasonable basis to advance a defense?

ANSWER

Yes.

19. Justice Marshall, for whom you clerked, believed the death penalty was always unconstitutional. Do you agree with Justice Marshall's views regarding the death penalty?

ANSWER

I clerked for Justice Brennan, whose views about the constitutionality of the death penalty were substantially similar to those of Justice Marshall. If I am confirmed, whatever personal views I might have respecting any legal issue will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, including *Gregg v. Georgia* and its progeny, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States). As I stated in response to Question 17, I will vigorously defend the federal death penalty statute, consistent with my responsibility to defend federal statutes.

20. Do you personally believe death penalty is a legitimate punishment?

ANSWER

If I am confirmed, whatever personal views I might have respecting any legal issue will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States). Congress has determined that there should be a federal death penalty, and I will defend the statutes that implement Congress's judgments.

21. How will you ensure that your personal views do not affect your judgment as Solicitor General of the United States?

ANSWER

If confirmed, I will carry out the responsibilities of the Office as other Solicitors General have done. I will rely on the extraordinarily talented and dedicated career attorneys who carry on the work of the Office. I will consult with Executive Branch departments and agencies (and, when appropriate, independent federal agencies) to determine what position is in the interests of the United States. And I will base my decisions on the law.

During my career in private practice I represented a wide variety of clients in cases raising a wide variety of legal and policy issues. I represented the interests of those clients vigorously on the basis of sound legal arguments and without regard to my own views of what the law should be. That is at the core of what it means for a lawyer to represent a client. I understand that, if confirmed, I will have a special obligation to represent the interests of the United States with vigor and to the best of my ability even if doing so conflicts with my own opinion in a particular matter. And I will do so.

22. In *Kennedy v. Louisiana*, the Supreme Court held that the death penalty for the crime of child rape always violates the Eighth Amendment. Writing for a five-justice majority, Kennedy based his opinion partly on the fact that 37 jurisdictions – 36 states and the federal government – did not allow for capital punishment in child rape cases. In reality, however, Congress and the President specifically authorized the use of capital punishment in cases of child rape under the Uniform Code of Military Justice (UCMJ) in the National Defense Authorization Act of 2006.
- a. Given the heinousness of the crime, as well as the federal government’s codification of capital punishment in child rape cases under the UCMJ, do you believe *Kennedy v. Louisiana* was wrongly decided? If not, why?
  - b. Following the Supreme Court’s decision, President Obama announced at a press conference: “I think that the death penalty should be applied in very narrow circumstances for the most egregious of crimes. I think that the rape of a small child, 6 or 8 years old, is a heinous crime.” Do you agree with that statement?
  - c. Would you, as Solicitor General, encourage the Court to reconsider its decision?

ANSWER (to Questions 22a, 22b, and 22c)

It would not be consistent with the responsibilities and role of the Solicitor General for me to express a view about any particular decision of the Court or to state whether I agree with criticisms of those decisions. Respect for *stare decisis* and for the Court’s precedents is an essential part of fulfilling the Solicitor General’s responsibilities to the Court. If I am confirmed, I would not lightly ask the Court to reverse one of its precedents, and I would not do so merely because I personally believed the Court reached the wrong result. There are circumstances, however, in which the Solicitor General properly could ask the Court to reconsider a decision. Of course, because the Solicitor General’s Office plays a reactive role, the Office could urge the Court to reconsider the *Kennedy* decision only if an appropriate case were to present itself in which the issue was presented in a manner suitable for Supreme Court consideration.

If I am confirmed, and if a particular case presented the question of whether *Kennedy* should be overruled, I would approach the question of whether the Court should overrule the *Kennedy* precedent in the following manner. First, I would need to determine whether, in the exercise of independent judgment, the long-term institutional interests of the United States would be served by the precedent being overturned. Second, I would need to determine whether the Supreme Court’s criteria for departing from *stare decisis* and overruling a precedent are met. In brief, that would mean assessing whether the precedent has been found unworkable; whether it could be overruled without serious inequity to those who have relied upon it; whether the law’s growth in the intervening years has left the precedent a doctrinal anachronism discounted by society; and whether its premises of fact have so far changed as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed. See *Montejo v. Louisiana*. Third, I would take into account the fact that asking the Supreme Court to overrule one of its

precedents is a grave matter, and that any such request – even if it could be justified based on the long-term institutional interests of the United States and based on the Court’s criteria – involves a substantial investment of the credibility of the Office of Solicitor General, and that such a step should therefore be taken only when circumstances truly warrant it. Finally, it would likely be relevant to my decision that the Supreme Court denied a petition for rehearing filed by the Respondent (with the support of the Solicitor General) in the *Kennedy* case which pointed out that the Court had not been informed of the provisions of the UCMJ mentioned in this Question. My decision would be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General’s Office regularly undertakes in order to determine the interests of the United States), and the views of the President would certainly be a relevant consideration.

23. In *Baze v. Rees*, you challenged the constitutionality of Kentucky’s lethal injection protocol. The issue in *Baze* was Kentucky’s three-drug protocol. When the federal government administers the death penalty, it uses the same three-drug protocol. For that reason the Solicitor General at the time, Mr. Clement, filed an *amicus* brief in support of the State of Kentucky. If you had been Solicitor General at the time, would you have submitted an *amicus* brief in support of Kentucky? Why or why not?

ANSWER

In the *amicus* brief it filed in *Baze v. Rees*, the United States explained its interest in the case as follows:

“This case involves a challenge to the constitutionality of Kentucky’s method of execution - lethal injection - based solely on the risk that the drugs involved will cause pain if improperly administered. Federal law authorizes capital punishment for a variety of offenses and provides that federal death sentences shall be implemented in the manner prescribed by the pertinent State’s own law. In conducting executions by lethal injection, the federal government administers the same series of three drugs as Kentucky. Several federal prisoners who have been sentenced to death are currently pursuing similar method-of-execution claims to the instant claim. See *Robinson v. Mukasey*, No. 1:07-cv-\*2 02145 (D.D.C.); *Roane v. Mukasey*, No. 1:05-cv-02337 (D.D.C.). The United States therefore has a substantial interest in this case.”

In my judgment, this statement set forth an entirely appropriate reason for the United States to have participated as *amicus curiae* in the case, under the standards I discuss in my response to Question 39a below.

24. Do you believe the federal government’s administration of the three-drug protocol is constitutional? Why or why not?

ANSWER

If I am confirmed, whatever personal views I might have respecting any legal issue will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

Under the Supreme Court's decision in *Baze v. Rees*, the federal government's three-drug protocol is not inherently unconstitutional because if administered properly it will inflict no pain. Therefore, under *Baze*, the federal protocol would be unconstitutional only if the procedures used to implement the protocol would be "sure or very likely to cause serious illness and needless suffering," and would give rise to "sufficiently imminent dangers" that present a "substantial risk of serious harm." Although I have not studied the matter, I am not aware of any information indicating that the federal government's procedures pose such risks.

25. Please briefly outline the arguments you would make in defense the federal government's three-drug protocol, if it were challenged.

ANSWER

If confirmed, I would defend the federal lethal injection protocol by showing that the procedures used to implement the protocol do not pose the kinds of serious risks the Supreme Court in *Baze v. Rees* established as necessary to make out an Eighth Amendment violation.

26. In *Fort-Wayne Books v. Indiana*, you signed onto an *amicus* challenging Indiana's RICO statute, which provided that obscenity offenses could serve as predicate acts. Even though Indiana's statute required the predicate act to be an obscenity, as defined under the *Miller v. California* three-prong test, you argued it was unconstitutional because it was vague and would have a chilling effect on protected speech. Under the federal RICO statute, sending obscene material through the mail may be used as a predicate act. If this or a similar statute is challenged before the Supreme Court, will you vigorously defend it?

ANSWER

Yes. The Supreme Court definitively resolved the issue in *Fort Wayne Books v. Indiana* more than twenty years ago, and it is well settled that obscenity enjoys no First Amendment protection.

27. I think everyone would agree that protecting children and families from obscenity is a worthwhile objective. Do you concur that the Justice Department must continue to

aggressively pursue criminal and civil litigation against those who violate federal obscenity laws? Why or why not?

ANSWER

Yes. The Department of Justice should continue to pursue criminal prosecutions and civil litigation aggressively against those who violate obscenity laws. If confirmed, I will vigorously defend challenges to the Department's enforcement of obscenity laws. It is well settled that obscenity enjoys no First Amendment protection.

28. You have argued on several occasions against laws that restrict the dissemination of pornography or indecent material, including laws intended to limit its access to children or restrict government financing of such material. In your *amicus* brief in *National Endowment for the Arts v. Finley*, you argued that Congress could not require the NEA to consider "general standards of decency" in making art grants. You argued the statute "imposes impermissible viewpoint-based criteria on NEA grants." In his concurrence, Justice Scalia agreed that it constituted viewpoint discrimination, but he said the First Amendment's prohibition against speech restrictions is inapplicable to congressional funding of that speech. Considering your views on First Amendment rights, please answer the following question:

- a. *Citizens United v. FEC* addressed the political speech of corporations. The Court held that the government had imposed speech restrictions based purely on the identity of the speaker. If you agree that Congress cannot impose speech restrictions upon the NEA, then do you agree that Congress cannot limit the political speech of corporations?

ANSWER

The *amicus* brief I filed in *National Endowment for the Arts v. Finley* was for the Rockefeller Foundation and sets forth the legal position that the Foundation wanted to present to the Supreme Court. The brief made an argument that Congress cannot use the spending power to impose viewpoint-based restrictions on grants that fund expressive activity, if those restrictions would violate the First Amendment had Congress sought to impose them directly. The question whether Congress can directly limit the political expenditures of corporations, which was at issue in the *Citizens United* case, did not involve any question regarding Congress's use of the spending power to impose conditions on federal funds. In all events, if confirmed, whatever personal views I might have respecting any legal issue – and whatever the views of my former clients – those views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, including the decision in *Citizens United*, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

29. In the recent Supreme Court decision of *Snyder v. Phelps*, the Court held that the First Amendment protects funeral protesters in the context of that case. Chief Justice Roberts wrote, “Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and - as it did here - inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course - to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.”

- a. Please evaluate the reasoning of Chief Justice Roberts.
- b. Do you personally agree with the holding?
- c. If not, do you agree with lone dissenter Justice Alito, who said “Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case”?
- d. Please evaluate the reasoning of Justice Alito’s dissent.

ANSWER (to Questions 29a, 29b, 29c, and 29d)

*Snyder v. Phelps* presented an important question of First Amendment law – whether and how the First Amendment limits the imposition of tort liability for the intentional infliction of emotional distress – in the highly charged context of picketing in connection with the funeral of a soldier killed in battle. Chief Justice Roberts’ opinion for the Court concluded that the First Amendment protected the speech at issue because it was speech to the public, on a public street and on matters of public concern, in accord with picketing laws, and it did not interfere with the funeral – even if the views expressed were deeply hurtful to the family of the fallen soldier and considered noxious by most of the public. Justice Breyer concurred to make the point that, while the speech at issue deserved protection in the particular context presented by the case, the case did not require the Court to decide the extent to which the government could regulate such expression consistent with the First Amendment to minimize intrusion on grieving families. Justice Alito dissented. In his view, the expression at issue was properly characterized as a vicious verbal assault on the dead soldier’s family at a time of maximum vulnerability for them, and the words inflicting injury made no material contribution to public debate and should therefore be actionable.

It would not be consistent with the responsibilities and role of the Solicitor General for me to express a view about any particular decision of the Court or to state whether I agree with any of the opinions in the case or criticisms of those opinions. Respect for *stare decisis* and for the Court’s precedents is an essential part of fulfilling the Solicitor General’s responsibilities to the Court. I can say that in my judgment each of the three opinions is a powerfully reasoned and eloquent statement of the legal view it expresses.

30. In his 2010 State of the Union address, the President characterized *Citizens United* this way:

“With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests, including foreign corporations, to spend without limit in our elections.”

- a. Do you agree that *Citizens United* “reversed a century of law”?
- b. If so, please explain the rationale supporting that conclusion.

ANSWER (to Questions 30a and 30b)

It would not be consistent with the responsibilities and role of the Solicitor General for me to express a view about any particular decision of the Court or to state whether I agree with criticisms of those decisions. Respect for *stare decisis* and for the Court’s precedents is an essential part of fulfilling the Solicitor General’s responsibilities to the Court. *Citizens United* involved a constitutional challenge to a congressional enactment, and the Solicitor General was responsible for defending it.

- c. If not, have you expressed your disagreement with anyone at the White House or within the Department, either before or after the President delivered his State of the Union?

ANSWER

In my more than 20 years representing clients in private practice, and in my two years of public service in the Executive Branch, it has often been my professional responsibility to explain to clients what the rule of law will permit and what the rule of law will not permit. As I am sure you can understand, the need for confidentiality is at its zenith in such situations. Clients would not feel free to ask for advice on such difficult and weighty issues if they had reason to fear that their requests, or their lawyers’ responses, would be disclosed to the public. Any conversations I may have had in the White House or at the Department of Justice must therefore remain confidential.

31. You wrote an *amicus* brief in petition for cert to the Supreme Court in *Housel v. Head*. Housel, who was a British National, was convicted and sentenced to death by the State of Georgia. In your brief, you argued Housel’s rights had been violated. However, you did not argue that his *constitutional* rights had been violated, but his “international human rights.” You concluded your brief by arguing, “[i]t is in the interests of the United States and the world community that the legal standards of the United States should reflect and be informed by international human rights.” If confirmed and you are litigating a death penalty case before the Supreme Court, are there any circumstances under which you would urge the Supreme Court to be “informed by international human rights”

ANSWER

In *Housel v. Head*, I filed an amicus brief as counsel for Members of Parliament of the United Kingdom as well as two professional legal organizations – the Law Society of England and the Human Rights Committee of the Bar of England and Wales. They had an interest in the case because the criminal defendant was a British subject. The legal arguments set forth in the brief represented the position that those Members of Parliament and professional organizations wanted to present to the Supreme Court. I served as their lawyer and presented their views.

If confirmed, my responsibility as Solicitor General will be to represent the United States, and to make determinations about what position the United States should take in the Supreme Court on the basis of the Constitution and laws of the United States. In making those determinations, I will adhere to the view that foreign law, including international human rights law, has no authoritative force in interpreting the Constitution and laws of the United States, except in those rare instances where federal statutes incorporate or make international and/or foreign court decisions binding legal authority.

- a. Please explain the distinction between “international human rights” and constitutional rights.

ANSWER

“Constitutional rights” are the rights established by the United States Constitution, which are binding and enforceable in the United States. “International human rights” are set forth in international treaties, conventions and customary international law. They are not binding and enforceable in the United States unless Congress has made them so.

32. Excepting treaties (and statutes that specifically call for consideration of foreign law), is it ever proper for judges to rely on contemporary foreign or international laws or decisions in determining the meaning of provisions of the U.S. Constitution?
  - a. If so, under what circumstances would you consider foreign law when interpreting the U.S. Constitution?

ANSWER

If confirmed, my responsibility as Solicitor General will be to represent the United States, and to make determinations about what position the United States should take in the Supreme Court on the basis of the Constitution and laws of the United States. In making those determinations, I will adhere to the view that foreign law, including international human rights law, has no authoritative force in interpreting the Constitution.

- b. If you were a judge, would you consider foreign law when interpreting the Eighth Amendment?

ANSWER

If confirmed, I will not be exercising the responsibilities of a judge. I can say that if I were a judge, I would follow the law established by the Supreme Court.

33. Is foreign law relevant when interpreting any other constitutional amendment (excluding the Eighth Amendment)?

ANSWER

If confirmed, my responsibility as Solicitor General will be to represent the United States, and to make determinations about what position the United States should take in the Supreme Court on the basis of the Constitution and laws of the United States. In making those determinations, I will adhere to the view that foreign law, including international human rights law, has no authoritative force in interpreting the Constitution.

34. Professor Goodwin Liu, the President's nominee to the Ninth Circuit Court of Appeals, believes that "foreign law can be cited in the same way that a law review article can be cited, which is simply to say, judges can collect ideas from anywhere that they find it persuasive." He distinguished between citing foreign law for "authority," as opposed to merely for "ideas or guidance."

- a. Do you believe this is a valid distinction? Please explain.

ANSWER

I recognize that some Justices of the Supreme Court believe that foreign law, while not authoritative or binding, can be a source of helpful ideas in interpreting the Constitution, and thus believe it is a valid distinction, while other Justices of the Supreme Court believe that foreign law should never be considered, even as a potential source of helpful ideas, in interpreting the Constitution. If I were to comment on the validity of the distinction, I would in effect be commenting on a difference of view that Justices of the Supreme Court have expressed in their opinions. I do not believe it would be consistent with the responsibilities and role of the Solicitor General for me to express a view about any particular decision of the Court or opinions of particular Justices, or to state whether I agree with criticisms of those decisions.

In all events, if I am confirmed, whatever personal views I might have respecting any legal issue will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

- b. If you were a judge, would you use foreign law for “ideas or guidance” when interpreting the U.S. Constitution? If so, under what circumstances and to what extent?

ANSWER

If confirmed, I will not be exercising the responsibilities of a judge. I can say that if I were a judge, I would follow the law established by the Supreme Court.

35. Under what circumstances would it be appropriate for the Solicitor General to change the position advocated by the previous Administration on a case pending before either a lower federal court or the Supreme Court?

ANSWER

Continuity and stability are important values in fulfilling the responsibilities of the Solicitor General to the Supreme Court, and in maintaining the credibility of the Office over the long term. It is my understanding that with respect to most cases, the Office’s position does not and should not change from administration to administration. I do believe there are circumstances under which it would be appropriate for a Solicitor General to change the position advocated by the previous administration, to reflect the legitimate legal policy objectives of an administration. Other Solicitor General nominees have made this point. For example, Ted Olson explained that, while partisan political considerations should play no part in any such decision, the “policies that have been advanced by a President can be and frequently are in any administration” reasons for a change in position. As he explained, “a particular administration may have an interest in enforcing the antitrust laws in a certain way or the environmental laws in a certain way. Those policy interests are among the things that the President is entitled to consider with respect to the discharge of his responsibility to faithfully execute the laws of the United States.” Kenneth Starr put it this way: “there are instances, for example, that the office might in fact be taking a contrary position to the position that had been advanced in a prior administration. That happens. Positions evolve, positions changed. The law does not calcify.”

- a. Have you discussed with anyone within the Administration any positions of previous Administrations that should be altered? If so, what prior positions did you discuss?

ANSWER

No.

36. In an interview with *Christianity Today*, President Obama stated that he believed States could ban partial-birth abortion. Do you agree with the President?

ANSWER

If I am confirmed, whatever personal views I might have respecting any legal issue, those views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States). In *Gonzales v. Carhart*, the Supreme Court upheld the federal Partial-Birth Abortion Act against a federal constitutional challenge. If I am confirmed, it would be part of my responsibility as Solicitor General to defend the Act.

37. In passing the FISA Amendments Act of 2008, Congress approved retroactive immunity for telephone companies that assisted the government in warrantless surveillance. President Obama initially opposed retroactive immunity for telephone companies, although he ultimately voted in favor of the FISA Amendments Act. The ACLU challenged the Act as unconstitutional, but the U.S. District Court for the Southern District of New York dismissed the case. However, the Second Circuit recently reversed the lower court's decision. Should it reach the Supreme Court, will you defend the immunity provision notwithstanding the President's apparent opposition? If not, why not?

ANSWER

I believe the Second Circuit case to which this question refers is *Amnesty International v. Clapper*. That case does not involve the provisions of the FISA Amendments Act of 2008 that provide immunity to telephone companies. It involves a constitutional challenge to Section 702 of the Act, which creates new procedures for authorizing government electronic surveillance targeting non-United States persons outside the United States for purposes of collecting foreign intelligence. I am not aware of a case in the Second Circuit challenging the immunity provisions of the FISA Amendments Act, although it is possible that there is such a case. There is at least one case pending either in the Ninth Circuit or in the U.S. District Court for the Northern District of California challenging the immunity provisions.

The Department of Justice has been vigorously defending both the Second Circuit challenge to Section 702 of the FISA Amendments Act and the Ninth Circuit challenge to the Act's immunity provisions. If confirmed, and based on what I know of the case challenging the immunity provisions, I can think of no reason why I would not continue to defend the interests of the United States vigorously in this case or other cases challenging the immunity provisions in the 2008 law. With respect to *Amnesty International v. Clapper*, I was asked about my ability to participate in the case by Senator Sessions (in view of the fact that I had filed an *amicus* brief in the Sixth Circuit in *ACLU v. National Security Agency*), and I provided the following answer:

If I am confirmed, I will consult with Department of Justice ethics officials and other officials as appropriate, before determining whether recusal is required. Prior to such consultation and analysis, I cannot say definitively that I would not recuse myself from

this matter. Based on what I know now, however, it does not seem likely to me that recusal would be required. The *Clapper* case in the Second Circuit involves a statute that was not at issue in *ACLU v. NSA*; the *Clapper* case raises a different legal issue than in *ACLU v. NSA*; I represented *amici* and not a party in *ACLU v. NSA*; and the brief I filed did not take a position on the standing issue; and the case was several years ago. Assuming I am not recused, I will advocate the position of the United States vigorously in the *Clapper* case. The case involves a challenge to a federal statute and I would have a responsibility to defend that statute vigorously

38. At her confirmation hearing, then-nominee Elena Kagan said,

*“If I am confirmed and I disagree with the President on the position to take in a case for which the Solicitor General’s office is responsible, I would do my best to persuade him of the correctness of the office’s views or the appropriateness of deferring to the office. (I believe that if the disagreement were with the Attorney General, a natural step would be to appeal to the President.) If the disagreement were to continue, I would consider the nature of the case, the nature of the disagreement, and the full range of ways to deal with the disagreement... If I believe this disagreement goes to a highly material matter – a matter, for example, that would involve me in failing to fulfill my essential obligations to the Court or Congress – I would have to resign my office.”*

At your hearing, you appeared far less committed to being independent from the President and Attorney General than then-nominee for Solicitor General, Elena Kagan. Senator Hatch asked, “if you believe that reasonable arguments exist to defend a statute’s constitutionality but the Attorney General or President says otherwise, will you defend the statutes or not, or resign?” You responded, “I would defend the statute unless instructed by my superior to do otherwise.” If you believe there is a reasonable basis on which to defend a statute and therefore the failure to do so would be an abdication of your duty, but the President or Attorney General nonetheless instructed you not to defend it, would you offer your resignation?

#### ANSWER

I appreciate the opportunity to clarify my testimony. As I stated in response to Questions 3, 4, 11, and 12 above, I believe that a conflict between the Solicitor General and his superiors over whether to defend the constitutionality of a statute could certainly justify resignation. If I, as Solicitor General, decided to defend an act of Congress, and the Attorney General or the President overruled that decision and ordered that the statute not be defended, based on what I believed to be political considerations or other illegitimate reasons, or an indefensible view of the law, I would not lend my name or that of the Office of the Solicitor General to carrying out the order, and would certainly resign rather than carry out the order.

39. At his nomination hearing, Ted Olson said, “A partisan interest from the standpoint of partisan politics should not be considered” when the Solicitor General chooses to submit an *amicus* brief to the Supreme Court.

- a. What factors would you consider when debating whether the file an *amicus* brief where the government is not a party?

ANSWER

As a general matter, the question whether to file an *amicus* brief is often raised in the first instance by a division of the Department of Justice or an Executive Branch department or agency that believes the United States has a substantial interest in the case and should weigh in. Whether in response to such a request or on the initiative of the Office, the Solicitor General’s Office would typically consult with all Executive Branch departments or agencies that might have an interest in the case or related cases. In some instances, it may be appropriate to consult with the parties in the case or other affected individuals or entities.

If confirmed, in making the judgment whether to authorize the filing of an *amicus* brief, I would take guidance from Rex Lee, who provided a set of guideposts on how to approach this issue. In a lecture entitled *Lawyering for the Government: Politics, Polemics & Principle*, which was published in the *Ohio State Law Journal* (47 *Ohio St. L.J.* 595 (1986)), he identified two categories of cases in which the United States would consider filing an *amicus* brief.

The first class of cases consists of “those that involved direct federal law enforcement interests. Examples are Title VII cases, antitrust cases, securities cases, or criminal cases in which the federal government did not happen to be one of the litigants, but the holding in the case probably would have a larger impact on the interests of the United States than it would have on the immediate parties.” In this class of cases, there would generally be strong reasons to file an *amicus* brief on behalf of the United States.

The second class of cases are those that Rex Lee describes as those that “have nothing to do with any federal law enforcement interest, but which fall right at the core of the current administration’s broader agenda” – by which he meant the President’s policy agenda, not partisan political concerns. With respect to this second class of cases, Rex Lee stated: “not only is it all right to file in a few of these non-federal cases, it is a part of your job, but it is a mistake to file in too many.” He went on to state that “while I think it is proper to use the office for the purpose of making my contribution to the President’s broader agenda, a wholesale departure from the role whose performance has led to the special status of the Solicitor General enjoys would unduly impair that status itself. In the process, the ability of the Solicitor General to serve any of the President’s objectives would suffer.”

If confirmed, I intend to follow the prudent approach Rex Lee described, and I certainly agree with Ted Olson’s view that partisan political considerations must play no role in any decision whether to file an *amicus* brief.

- b. How would you ensure that you do not submit frivolous *amicus* briefs, but only in cases where the interest of the United States is obvious, or direct?

ANSWER

If confirmed, I will follow the approach set forth by Rex Lee, which I described in the preceding answer, which reflects the importance of filing *amicus* briefs only when warranted.

- c. If the Attorney General or the President requested that you file such a brief and you objected, how would you resolve that conflict?

ANSWER

If I am confirmed, and if I disagree with the Attorney General or the President on the position to take in a case for which the Solicitor General's Office is responsible, I would do my best to persuade him of the correctness of the Office's views or the appropriateness of deferring to the Office. If I am unable to persuade the Attorney General or the President that filing a brief is not consistent with the long-term institutional interests of the United States (or is otherwise inappropriate for reasons of the kind Rex Lee identified in the article I referenced above), then I will need to assess the basis of the disagreement. If I believed the instruction was based on partisan political considerations or other illegitimate reasons, or an indefensible view of the law, I would not be able to carry out the order. I do not believe there is any significant likelihood that this will happen. But I am prepared to resign if it does.

- d. If the President or Attorney General directed you not to file such a brief, how would you resolve the conflict?

ANSWER

If I am confirmed, and if I am instructed by the Attorney General or the President not to file an *amicus* brief in a case in which I have determined that an *amicus* brief should be filed, I would do my best to persuade him of the correctness of the office's views or the appropriateness of deferring to the office. If I am unable to persuade the Attorney General or the President that the long-term institutional interests of the United States require filing an *amicus* brief in a particular case, then I will need to assess the basis of the disagreement. If I believed the instruction was based on partisan political considerations or other illegitimate reasons, or an indefensible view of the law, I would not be able to carry out the order. I do not believe there is any significant likelihood that this will happen. But I am prepared to resign if it does.

40. At his nomination hearing, Ted Olson agreed that the Solicitor General must defend a congressional statute if there is a good-faith argument in support of its constitutionality.

- a. What factors will you consider when determining whether there is a good faith argument in support of a statute?

ANSWER

If confirmed, I will apply the standards the Department traditionally applies. The Department's longstanding practice has appropriately been to defend federal statutes unless they fall into one of the two narrow and traditionally recognized exceptions – where a statute violates the separation of powers by infringing on the President's constitutional authority, or where there are no reasonable arguments that can be offered in its defense. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

- b. Whose opinion will you consider when making this assessment and what weight would you give to that opinion?

ANSWER

If confirmed, I will continue to follow the time-honored processes of the Solicitor General's Office. Typically, the question whether to file an *amicus* brief is often raised in the first instance by a division of the Department of Justice or an Executive Branch department or agency that believes the United States has a substantial interest in the case and should weigh in. Whether in response to such a request or on the initiative of the Office, the Solicitor General's Office would typically consult with all Executive Branch departments or agencies that might have an interest in the case or related cases. In some instances, it may be appropriate to consult with the parties in the case or other affected individuals or entities. I would give the views expressed in all of these consultations appropriate weight in exercising my independent judgment.

41. At his nomination hearing, Ted Olson unequivocally said he would tell the President "no" if the President is in error on a legal question.

- a. Do you agree with Mr. Olson's approach? Why or why not?

ANSWER

I agree with Ted Olson's approach, and with the similar view other Solicitor General nominees have expressed on this issue. For example, Paul Clement testified that that "[o]f course, the President ultimately has the right under the Constitution to have his Solicitor General file the brief he wants filed. At the same time, he does not have the right to insist that I file any particular brief. I can certainly imagine situations in which I would resign before filing a brief that I thought outside the bounds of proper advocacy, and I can imagine other situations in which the handling of a series of briefs would lead me to resign." Similarly, Kenneth Starr, in his written testimony to this Committee, recognized that "the Attorney General retains responsibility for and ultimate direction of the Government's arguments before the courts." He then went on to say: "[i]f I were being asked [by the Attorney General or the President] to take what I thought was a legally indefensible position, I would not sign the brief or make that argument." Charles

Fried – after recognizing that the Attorney General has “clear statutory authority” to overrule the Solicitor General – stated during his confirmation hearing that if a case should arise “in which the Attorney General should direct the Solicitor General to take a position which is not simply one with which he does not agree, but which he feels is influenced by improper factors, or, cannot conscientiously be urged to the Court, then the Solicitor General should simply not do that.” I hold the same view.

- b. Have you ever told the President or Attorney General “no”?

ANSWER

In my more than 20 years representing clients in private practice, and in my two years of public service in the Executive Branch, it has often been my professional responsibility to explain to clients what the rule of law will permit and what the rule of law will not permit. As I am sure you can understand, the need for confidentiality is at its zenith in such situations. Clients would not feel free to ask for advice on such difficult and weighty issues if they had reason to fear that their requests, or their lawyers’ responses, would be disclosed to the public. Any conversations I may have had with the President in my role as Deputy Counsel must therefore remain confidential. Any conversations I may have had with the Attorney General in my role as Associate Deputy Attorney General likewise must remain confidential.

42. At his hearing, Ted Olson said he “would consult with the ethics officials in the Department of Justice, and... take their advice into consideration” before deciding whether or not to recuse himself from a particular case.

- a. How would you ensure that your representation of the United States is ethically sound and free of any conflicts of interest?

ANSWER

I will strictly adhere to the legal requirements and ethical standards that govern potential conflicts of interest. I will consult with Department of Justice ethics officials and other officials as appropriate, and I will be guided by the advice I receive from them.

- b. If there is a potential conflict of interest, how would handle it?

I will strictly adhere to the legal requirements and ethical standards that govern potential conflicts of interest and will be guided by the advice I receive from ethics officials at the Department of Justice, and will accordingly recuse myself from participation in any matter in which my recusal is required.

ANSWER

- c. Please identify any potential conflicts or recusals you might face, if confirmed.

ANSWER

I am aware of one case, *General Dynamics v. United States*, in which I represented a party while in private practice against the United States that remains in litigation. If confirmed, I would recuse myself from any participation in the matter.

It is possible that other litigation in which I represented a private party during my time in private practice might present an occasion for the United States to offer its views to the Supreme Court or a court of appeals. The most likely example of such a case is *Viacom v. YouTube*, a copyright infringement case raising issues under the Digital Millennium Copyright Act that is presently before the Second Circuit. If that case, or any other in which I represented a client while in private practice, comes before the Department of Justice, I will recuse myself.

I have also recused myself from all litigation involving Jose Padilla, on the basis of the *amicus* brief I filed on behalf of clients in the Second Circuit, and would continue to do so if confirmed.

There may also be other matters that do not now come to mind. I will be vigilant to ensure that I adhere to the legal requirements and ethical standards that govern potential conflicts of interest.

43. At his nomination hearing, Drew Days said, “the duty [of the Solicitor General is] to ensure that the Government speaks to the Court in a coherent voice.”

- a. Do you agree that it is the duty of the Solicitor General “to ensure that the Government speaks to the Court in a coherent voice”?

ANSWER

Yes. As I explained in response to Question 11 above, one of the reasons for creating the position of Solicitor General was to ensure uniformity and consistency in the positions of the United States in litigation. The Solicitor General must decide what position the United States will take before the Supreme Court. As Drew Days observed, often the many departments and agencies within the Executive Branch, and even divisions within the Department of Justice, will have different and competing views over what the position of the United States should be in a particular case. If possible, the Solicitor General will reconcile differing views into a consensus position. But it may not always be possible to do so. In such cases, it will ultimately be up to the Solicitor General to decide what the litigating position of the United States will be.

- b. How will you ensure the Government speaks to the Court in a coherence voice?

ANSWER

I understand that to arrive at a judgment about what position the United States will take before the Supreme Court involves a great deal of Executive Branch deliberation. Paul Clement described the process this way in his written testimony: “the decision-making process typically involves ongoing give and take and, where there is disagreement in the initial recommendations,

often involves meetings where the goal and sometimes the result is to obtain a consensus position that accommodates the interests that initially produced disparate initial recommendations.” If confirmed, I will follow this time-honored decision-making process.

- c. If you agree with Mr. Days, are there any circumstances under which that duty would trump your duty to defend a statute if there is a reasonable basis to do so?

ANSWER

When Congress passes a law, the Department of Justice should vigorously defend that law against constitutional challenge. There are only two exceptions. The first is where the statute violates the separation of powers by infringing on the President’s constitutional authority. The second is where there are no reasonable arguments that can be offered in defense of a statute. These exceptions are narrow and they apply only in rare circumstances, and should be invoked only after the most grave and careful deliberation. Consideration of the views of Executive Branch departments and agencies will be an important part of the process of any such decision. Ultimately, however, the Solicitor General must make an independent judgment regarding the defense of an act of Congress.

44. Drew Days said, “in carrying out [the] responsibility [of the Solicitor General], the Solicitor General ultimately must take a stand,” after “hear[ing] competing views in the administration prior to arriving at a final position and, wherever principle permits, to seek to reconcile differences of affected agencies.”

- a. Do you agree with Mr. Days?
- b. If so, what is your plan, if confirmed, to accomplish this?
- c. If not, what is your view of the responsibility of the Solicitor General?
- d. How much deference will you afford those views when advocating for acts of Congress before the Supreme Court?

ANSWER (to Questions 44a, 44b, 44c and 44d)

I agree with Drew Days that the Solicitor General has the responsibility to determine what the litigation position of the United States will be in cases before the Supreme Court, and that the exercise of that responsibility ultimately requires the Solicitor General to reconcile sometimes competing views of Executive Branch departments and agencies – through the process of interagency deliberation and internal Department of Justice review described in my response to Question 43 above. Ultimately, however, it is the Solicitor General who must exercise independent judgment on the question of defending acts of Congress before the Supreme Court. When advocating for acts of Congress before the Supreme Court, it would generally be sensible for a Solicitor General to give considerable weight to the Executive Branch departments or

agencies Congress has charged with enforcing and implementing those enactments because of their expertise and experience in litigation over the statutes at issue.

45. At his nomination hearing, Mr. Days said, “[I]f people didn’t challenge precedent under some circumstances, we would still be left with *Plessy v. Ferguson*. So I think that one has to achieve some balance between respecting *stare decisis* and being bold enough to challenge where there seems to be good and sufficient justification for doing so.”

- a. Do you agree with Mr. Days that there is a balance between *stare decisis* and challenging precedent where there is “good and sufficient justification for doing so”?

ANSWER

If confirmed, and if the question is raised in a case that comes before me. I would approach the question of whether there is a “good and sufficient reason” for asking the Supreme Court to overturn one of its precedents in the following manner. First, I would need to determine whether, in the exercise of independent judgment, the long-term institutional interests of the United States would be served by the precedent being overturned. Second, I would need to determine whether the Supreme Court’s criteria for departing from *stare decisis* and overruling a precedent are met. In brief, that would mean assessing whether the precedent has been found unworkable; whether it could be overruled without serious inequity to those who have relied upon it; whether the law’s growth in the intervening years has left the precedent a doctrinal anachronism discounted by society; and whether its premises of fact have so far changed as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed. *See Montejo v. Louisiana*. Third, I would take into account the fact that asking the Supreme Court to overrule one of its precedents is a grave matter, and that any such request – even if it could be justified based on the long-term institutional interests of the United States and based on the Court’s criteria – involves a substantial investment of the credibility of the Office of Solicitor General, and that such a step should therefore be taken only when circumstances truly warrant it. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General’s Office regularly undertakes in order to determine the interests of the United States).

- b. If confirmed, under what circumstances would you discard precedent in your arguments?

ANSWER

If confirmed, I will never discard precedent in making arguments to the Supreme Court or any other court. Precedent is always entitled to respect, even in the rare cases in which the United States advocates that a precedent be overruled.

46. At his nomination hearing, Charles Fried said, “partisan policy considerations have never entered into our judgments, never should enter into our judgments, and I would never allow them to enter into judgments.” Similarly, Senator Lee asked you whether you believe it is the duty of the Solicitor General to advance the political agenda of the President. You said, “No...I think the duty of the Solicitor General is to advance the long-term institutional interests of the United States, and it is not a partisan job.”

- a. What “long-term institutional interests” of the United States would you advance, if confirmed?

ANSWER

The long-term institutional interests of the United States are determined by the entities to which our Constitution assigns the responsibility to make and execute federal policy: the Congress and the Executive Branch. If confirmed, I would look to the judgments of Congress as expressed in statutes and to the judgments of the Executive Branch as expressed in regulations and other forms of policy guidance. Partisan political considerations will play no part in carrying out my responsibilities.

- b. How will you handle conflicts between these competing interests – the President’s agenda and your duties as Solicitor General?

ANSWER

If I am confirmed, partisan political considerations will play no part in carrying out my responsibilities as Solicitor General. As other Solicitors General – including Rex Lee, Kenneth Starr, and Ted Olson – have stated in their testimony to this Committee, the President’s legal views and policy objectives are legitimate considerations in making judgments about the long-term institutional interests of the United States.

- c. Given your prior positions within President Obama’s Administration, how can the Committee be assured that partisan policy considerations would never enter into your judgments as Solicitor General, if confirmed?

ANSWER

I have given my assurance to this Committee that partisan political considerations will play no part in my judgments if confirmed. To the extent that more is required, I can only say that throughout my more than 20 years in private practice and my two years of public service in the Executive Branch I have always endeavored to conduct myself with personal and professional integrity and to show the greatest fidelity to the rule of law and reverence for our Constitution. The letters submitted in support of my nomination (from former Solicitors General Fried, Starr, Days, Dellinger, Waxman, Olson, Clement and Garre, from leaders of the appellate bar who

know me and my work, and from the general counsels of corporations I have represented and opposed) may provide some measure of confidence that my assurances are reliable.

- d. At your hearing, you told Senator Lee, "I can assure you that decisions I make will be made on the law and not on partisan considerations." How will you ensure your views remain grounded in the law?

ANSWER

I believe my response to Question 21 provides a response to this question.

47. At his nomination hearing, Charles Fried said, "if the case should ever arise in which the Attorney General should direct the Solicitor General to take a position which is not simply one with which he does not agree, but which he feels is influenced by improper factors, or, cannot conscientiously be urged to the Court, then the Solicitor General should simply not do that."

- a. If confirmed, how would you ensure that the Attorney General's directions are not influenced by improper factors, but based in the law?

ANSWER

If confirmed, I will do as other Solicitors General have done and give the Attorney General my best independent judgment of what the law requires.

- b. If you believe the Attorney General has directed you to take a position for reasons that are improper, what course of action would you take?

ANSWER

If confirmed, I would not expect to face a situation in which the Attorney General directs me to take a position for reasons that are improper. But if I do face such a situation, I will first attempt to persuade the Attorney General to rescind the instruction based on my own independent legal judgment. If I am unable to persuade the Attorney General, then it would be appropriate to consider an appeal to the President if circumstances warrant it. If the Attorney General (or the President) directed that I take a position, based on what I believed to be partisan political considerations or other illegitimate reasons, or on what I believed to be an indefensible view of the law, I would not lend my name or that of the Office of the Solicitor General to carrying out the order, and would certainly resign rather than carry out the order.

- c. Please describe the factors that you believe would be improper for the President or Attorney General to consider.

I believe my response to Question 47b above provides a response to this question.

48. At Mr. Fried's nomination hearing, Senator Metzenbaum asked him whether he could provide an example of the Solicitor General advocating that the Supreme Court reverse a decision recognizing a fundamental constitutional right for individuals. Mr. Fried said there are "many examples of the Solicitor General urging in an *amicus* brief that established Supreme Court precedent be reconsidered."

- a. If you had been asked the question, how would you have responded?

ANSWER

As an historical matter, I can think of instances in which the Solicitor General's Office has filed briefs advocating the reversal of a decision recognizing a constitutional right for individuals. Between 1985 and 1992, the Office filed briefs advocating that the Supreme Court reverse *Roe v. Wade*. In 2009, the Office filed a brief in *Montejo v. Louisiana* advocating that the Sixth Amendment limitations on interrogations set forth in *Jackson v. Michigan* be overruled. There may well be other instances, but I believe they are infrequent.

- b. If confirmed, would you consider filing *amicus* briefs that urge the Court to reconsider some precedent?

ANSWER

The Solicitor General's responsibilities as an officer of the Supreme Court include fidelity to the principle of *stare decisis* and respect for the Court's precedents. Although rare, cases may arise in which it is appropriate to ask the Supreme Court to reconsider a precedent, and to do so in a case in which the United States is not a party. One historical example is *Brown v. Board of Education*, in which the United States filed an *amicus* brief urging the Supreme Court to overrule the separate-but-equal doctrine of *Plessy v. Ferguson*. A more recent historical example is *Montejo v. Louisiana* in 2009, in which the Solicitor General filed an *amicus* brief in a state criminal case urging that the Sixth Amendment rule of *Jackson v. Michigan* be overruled.

- c. If so, under what circumstances?

ANSWER

If confirmed, I would approach this question in the following manner. First, I would need to determine whether, in the exercise of independent judgment, the long-term institutional interests of the United States would be served by the precedent being overturned. Second, I would need to determine whether the Supreme Court's criteria for departing from *stare decisis* and overruling a precedent are met. In brief, that would mean assessing whether the precedent has been found unworkable; whether it could be overruled without serious inequity to those who have relied upon it; whether the law's growth in the intervening years has left the precedent a doctrinal anachronism discounted by society; and whether its premises of fact have so far changed as to render its central holding somehow irrelevant or unjustifiable in dealing with the

issue it addressed. *See Montejo v. Louisiana*. Third, I would take into account the fact that asking the Supreme Court to overrule one of its precedents is a grave matter, and that any such request – even if it could be justified based on the long-term institutional interests of the United States and based on the Court’s criteria – involves a substantial investment of the credibility of the Office of Solicitor General, and that such a step should therefore be taken only when circumstances truly warrant it. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General’s Office regularly undertakes in order to determine the interests of the United States).

- d. Please identify any issues that you believe warrant Supreme Court reconsideration.

ANSWER

It would not be consistent with the responsibilities and role of the Solicitor General for me to express a view about any particular decision of the Court or to state whether I agree with any criticisms of those opinions. Respect for *stare decisis* and for the Court’s precedents is an essential part of fulfilling the Solicitor General’s responsibilities to the Court. Moreover, if I am confirmed, whatever personal views I might have respecting any legal issue will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General’s Office regularly undertakes in order to determine the interests of the United States).

49. As Solicitor General, you would be representing the United States and its laws. While a judge has an obligation to uphold precedent, the Supreme Court can change precedent, and often Courts of Appeals have no binding Supreme Court precedent.

- a. What principles would guide you in urging a court to modify or overrule an existing precedent?

ANSWER

If confirmed, I would approach this question in the following manner, with respect to a Supreme Court precedent. First, I would need to determine whether, in the exercise of independent judgment, the long-term institutional interests of the United States would be served by the precedent being overturned. Second, I would need to determine whether the Supreme Court’s criteria for departing from *stare decisis* and overruling a precedent are met. In brief, that would mean assessing whether the precedent has been found unworkable; whether it could be overruled without serious inequity to those who have relied upon it; whether the law’s growth in the intervening years has left the precedent a doctrinal anachronism discounted by society; and whether its premises of fact have so far changed as to render its central holding somehow

irrelevant or unjustifiable in dealing with the issue it addressed. *See Montejo v. Louisiana*. Third, I would take into account the fact that asking the Supreme Court to overrule one of its precedents is a grave matter, and that any such request – even if it could be justified based on the long-term institutional interests of the United States and based on the Court’s criteria – involves a substantial investment of the credibility of the Office of Solicitor General, and that such a step should therefore be taken only when circumstances truly warrant it. If the question arose regarding court of appeals precedent, additional considerations would come into play, including whether the court’s precedent conflicted with the weight of decisions in other circuits, and whether the precedent had been called into question by an intervening Supreme Court decision. In any court, my decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General’s Office regularly undertakes in order to determine the interests of the United States).

- b. Under what circumstances is it appropriate for the Supreme Court to overrule precedent?

ANSWER

It is up to the Supreme Court to decide when it is appropriate to overrule one of its precedents. The Court generally assesses whether the precedent has been found unworkable; whether it could be overruled without serious inequity to those who have relied upon; whether the law’s growth in the intervening years has left the precedent a doctrinal anachronism discounted by society; and whether its premises of fact have so far changed as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed. *See Montejo v. Louisiana*. If confirmed, I will apply that law in exercising my independent judgment, consistent with the respect for precedent and the principle of *stare decisis* that the Solicitor General owes to the Supreme Court.

- c. Under what circumstances is it appropriate for a Circuit Court to override its precedent?

ANSWER

A federal circuit court can override a precedent only in an *en banc* proceeding. Federal Rule of Appellate Procedure 35 (and related local rules) set forth the criteria for when *en banc* consideration is appropriate.

50. Given the caseload of the Solicitor General’s Office, one of the most common questions you are likely to confront is the degree of deference to afford executive agencies. For example, the Securities and Exchange Commission may believe it has an issue that merits review by the Supreme Court.

- a. How much deference will you afford executive agencies?

- b. If you disagreed with the executive agency, how would you balance your views and the deference you might afford that agency?
- c. If the agency in question were an independent agency, how would you respond to (a) and (b) above?

ANSWER (to Questions 50a, 50b, and 50c)

If confirmed, in answering questions of this kind I would be obliged to follow the law set forth by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* and its progeny. The *Chevron* doctrine makes clear that the intent of Congress governs the deference afforded to Executive Branch agencies and departments and to independent agencies. If Congress has spoken directly to the question at issue in a statute, then an agency does not have the authority in implementing the statute to depart from Congress's clearly expressed intent. If Congress has not spoken directly to the question at issue (because, for example, the statute is written in broad terms or particular provisions are ambiguous), then Congress is deemed to have delegated to the department or agency the discretion to make policy judgments in implementing the statute, so long as those judgments are well-reasoned and not inconsistent with the statutory text.

In deciding the litigating position of the United States before the Supreme Court in a case challenging the lawfulness of an agency rule or order, I will (if confirmed) first have to make an independent judgment whether the agency rule or order contravenes the clearly expressed intent of Congress. Although I would certainly give careful consideration to the views of the agency or department charged with implementing the statute, ultimately this is a question on which independent judgment is required to ensure that the will of Congress is respected, and I would not defer to the department or agency in making that judgment. If I concluded that Congress had not spoken directly on the question at issue in the statute, then the department or agency would have discretion to make policy choices so long as those choices were well-reasoned and not inconsistent with the statute. In this latter category, the department or agency's views about policy would be entitled to deference, but the questions of whether the policy choice is based on a well-reasoned analysis and is consistent with the statute are legal judgments on which I would have to exercise independent judgment, giving due consideration to the views of the department or agency on those questions. I would apply the same analysis when considering rules or orders of independent agencies.

51. In his nomination hearing, former Solicitor General Paul Clement said that "one of the things that is really [a] valued tradition[] in the Office of Solicitor General is the fact that there is a great continuity in the office." He was referring to how little changes in the Office from one Administration to next.

- a. In what ways is continuity an asset to the Office of Solicitor General?

ANSWER

In the lecture I referenced in my response to Question 39a above, Rex Lee stated that the Solicitor General's Office "provides the Court from one administration to another – and largely without regard to either the political party or the personality of the particular Solicitor General – with advocacy which is more objective, more competent, and more respectful of the Court as an institution than it gets from any other group of lawyers." I agree with the views expressed by Rex Lee in this statement. The credibility of the Solicitor General's Office before the Supreme Court is essential to allowing the Solicitor General to fulfill his or her responsibilities as an officer of the Supreme Court. At the same time, the reservoir of credibility that such advocacy builds up will serve the interests of any President and any administration in achieving its overall objectives, even if it means that that administration must forego taking a position that might advance a particular administration objective in a particular case.

- b. When is it appropriate, in your view, for a legal position to change between one Administration and the next?
- c. On what basis should those changes be made?

ANSWER (to Questions 51b and 51c)

I believe my response to Question 35 above provides a response to these questions.

- d. If confirmed, would you respect this tradition? Why or why not?

ANSWER

Yes, for the reasons Rex Lee identified.

- c. If so, what particular steps would you take to promote continuity?

ANSWER

If confirmed, I will follow the time-honored processes of the Solicitor General's Office. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States). In my judgment, that is the best way to promote the values of continuity that Rex Lee identified.

- 52. In late 2008, the Department of Health and Human Services issued the "Conscience Rule" to end discrimination against health care providers who decline to participate in abortion because of their moral or religious beliefs. Do you believe a reasonable argument can be made to support the "Conscience Rule"?

- a. Do you support a right of health care providers to decline to participate in abortions because of their moral or religious beliefs?

ANSWER

If I am confirmed, whatever personal views I might have respecting any legal issue, those views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

Several federal statutes guarantee health care providers the right to refrain from participating in abortion procedures because of their moral or religious beliefs. If those laws are challenged, I will vigorously defend them.

- b. Will you defend federal laws and regulations protecting health care providers who decline to participate in abortions because of their moral or religious beliefs?

ANSWER

Yes.

53. In 2007 by a vote of 5 to 4, the U.S. Supreme Court in *Gonzales v. Carhart* rejected a facial challenge to the Federal Partial-Birth Abortion Act, but left open the possibility that as-applied challenges could be brought to narrow the scope of the Act's application. Your role as Solicitor General would require you to defend the Act against such challenges. Do you believe *Gonzales v. Carhart* was correctly decided? Why or why not?

ANSWER

I do not believe it would be consistent with the responsibilities and role of the Solicitor General for me to express a view about any particular decision of the Court or to state whether I agree with criticisms of those decisions. Respect for *stare decisis* and for the Court's precedents is an essential part of fulfilling the Solicitor General's responsibilities to the Court.

- a. Under what circumstances would you fail to defend the Act?

ANSWER

If confirmed, I would apply the standards the Department traditionally applies. The Department's responsibility is to defend federal statutes unless they fall into one of the two narrow and traditionally recognized exceptions – where a statute violates the separation of powers by infringing on the President's constitutional authority, or where there are no reasonable

arguments that can be offered in its defense. My decisions respecting the Federal Partial-Birth Abortion Act and all other federal statutes would be based on the law as the Supreme Court has determined it, including *Gonzales v. Carhart*, the factual circumstances in which the law is applied, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

54. *Roe v. Wade* and *Planned Parenthood v. Casey* are still good law and uphold the right of a woman to obtain an abortion. However, the "undue burden" standard of *Casey* has been somewhat unclear.

- a. Does the U.S. Constitution confer a right to abortion? If so, what clauses confer that right?

ANSWER

The Supreme Court has held that the Constitution protects a woman's right to terminate a pregnancy in certain circumstances, subject to various permissible forms of governmental regulation. See *Planned Parenthood v. Casey*. If I am confirmed, whatever personal views I might have respecting any legal issue will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

- b. Does the U.S. Constitution compel taxpayer funding of abortion? Why or why not?

ANSWER

The Supreme Court has held that the U.S. Constitution does not compel taxpayer funding of abortion. The Court held in *Harris v. McRae* that it "simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."

- c. Do you believe the U.S. Constitution permits taxpayer funding of abortion? If so, based on what clause?

ANSWER

If I am confirmed, whatever personal views I might have respecting any legal issue, those views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, including *Harris v. McRae*, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive

deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

- d. Does the U.S. Constitution prohibit informed-consent and parental involvement provisions for abortion? Why or why not?

ANSWER

Under prevailing Supreme Court precedent, a particular informed-consent or parental-involvement law will be upheld as constitutional if it does not impose an "undue burden" on a woman's right to terminate a pregnancy. *Planned Parenthood v. Casey* upheld informed-consent and parental-consent provisions under this standard.

55. Virginia Seitz has been nominated to be Assistant Attorney General for the Office of Legal Counsel. Ms. Seitz authored a brief in *Grutter v. Bollinger*, arguing that diversity was a compelling institutional interest.

- a. Do you agree with Ms. Seitz that diversity is a valid institutional interest for a government entity, consistent with the Equal Protection Clause?

ANSWER

The Supreme Court held in *Grutter v. Bollinger* that the Equal Protection Clause of the Fourteenth Amendment permits a state educational institution, in appropriate circumstances, to establish a compelling interest in advancing student body diversity as part of the mission of the educational institution. My understanding is that under the Supreme Court's precedents, an educational institution cannot justify the use of quotas to achieve a diversity objective, but can consider the institutional benefits of diversity only as part of a broader assessment of institutional objectives and must be able to show that methods of promoting diversity that do not involve race-conscious choices are insufficient to achieve the institution's legitimate objectives.

- b. Do you believe the "disparate impact" justification for diversity, advanced in *Ricci v. DeStefano*, conflicts with either the Equal Protection Clause or relevant statutory language?

ANSWER

In *Ricci v. DeStefano*, the Supreme Court held that a race-based action of an employer like the City of New Haven "is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact" provisions of Title VII. The Court did not reach the Equal Protection Clause question because it found the City's actions unjustified under Title VII, but noted that it had not held "that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case."

If I am confirmed, whatever personal views I might have respecting any legal issue will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, including *Ricci v. DeStafano*, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

56. President Obama sharply criticized the Court's decision in *Citizens United v. FEC*. If Congress passes and the President signs into law a statute that attempts to circumvent *Citizens United*, would you be able to defend such a law as consistent with the First Amendment?

ANSWER

I believe that when Congress passes a law, the Department of Justice should vigorously defend that law against constitutional challenge. That is a vitally important principle and a longstanding tradition of the Department of Justice, which affords appropriate respect to Congress as a co-equal branch of government by recognizing the strong presumption of constitutionality that attaches to congressional enactments, and I fully subscribe to it. There are only two exceptions. The first is where a statute violates the separation of powers by infringing on the President's constitutional authority. The second is where there are no reasonable arguments that can be offered in defense of a statute. In exercising independent judgment on the question of whether reasonable arguments can be offered in defense of a statute, I would of course make that judgment on the basis of binding Supreme Court precedent, including the *Citizens United* decision. Any such judgment would require extensive consideration and deliberation within the Department of Justice and with all Executive Branch departments and agencies that have an interest in the matter. Of course, any such analysis would require careful scrutiny of the actual legislative text Congress enacted, as well as the legislative record assembled in connection with the legislation.

57. Do you believe the Democracy Is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act, S. 3628 (111th Congress), is constitutional? Why or why not?

ANSWER

If I am confirmed, whatever personal views I might have respecting any legal issue, my personal views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States). That would be true with respect to the DISCLOSE Act (if Congress were to enact it into law) and all other federal laws.

Thus, if Congress were to enact the DISCLOSE Act, I would defend it against constitutional attack unless the law violated the separation of powers, or there was no reasonable argument that could be advanced in its defense.

58. It is likely that the Patient Protection and Affordable Care Act will reach the Supreme Court. And it is likely that the President will wish to defend the Act.

- a. Do you believe there are any reasonable arguments that can be made in defense of the statute?

ANSWER

The Patient Protection and Affordable Care Act is entitled to a strong presumption of constitutionality, like all statutes, and based on my work thus far, there do appear to be reasonable arguments that could be advanced in defense of that statute, in light of existing Supreme Court authority. Before making a decision on the question as Solicitor General, however, I would need to give the issue the full consideration it deserves, which would include extensive deliberations with lawyers in the Department of Justice and with Executive Branch departments and agencies that have an interest in the matter – as I understand the Solicitor General’s Office does with respect to any matter of significance.

- b. Do you believe that the individual mandate can be severed from the Patient Protection and Affordable Care Act? Please explain.

ANSWER

If I am confirmed, whatever personal views I might have respecting any legal issue, my personal views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General’s Office regularly undertakes in order to determine the interests of the United States).

My understanding is that the Department of Justice has argued in litigation that the individual mandate (which is also referred to as the minimum coverage provision) can be severed from the bulk of the Affordable Care Act under longstanding Supreme Court severability law that requires courts to preserve as much of a congressional enactment as can be preserved consistent with congressional intent. Based on what I know of the issue, I have no basis for disagreeing with that argument.

- c. Can one make any reasonable arguments in defense of the Act, or does it implicate that exception to the Solicitor General’s duty to defend?

ANSWER

The Department of Justice has advanced arguments in favor of the Affordable Care Act's constitutionality in numerous district and appellate court proceedings. In most of the district court cases decided to date, the courts have dismissed constitutional challenges to the Act on standing or other threshold grounds. At this point, the majority of district courts that have found standing and ruled on the merits have upheld the Act entirely against all constitutional challenges. The two district courts that declared the minimum coverage provision (or individual mandate) unconstitutional nevertheless expressed the view that there was support in the law for the position that the provision is a valid exercise of Congress's Commerce Clause authority and therefore constitutional. On the basis of those rulings, and the arguments the Department of Justice has advanced in defense of the statute, I can see no basis for concluding that the Affordable Care Act would implicate any exception to the Solicitor General's longstanding practice of defending congressional enactments.

- d. Do you believe that the individual mandate is within Congress' power under the Interstate Commerce Clause?
  - i. If yes, on what basis can Congress mandate that individuals purchase a product?
  - ii. Do you believe individuals are engaging in economic activity when they choose not to purchase a private product?

ANSWER (to Questions 58d(i) and (ii)).

If I am confirmed, whatever personal views I might have respecting any legal issue, my personal views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

I understand that the Department of Justice has argued in litigation that the minimum coverage provision (or individual mandate) is a constitutional exercise of Congress's Interstate Commerce Clause authority. The Department's briefs argue that the minimum coverage provision is a constitutional exercise of the Commerce power because it regulates economic activity that substantially affects interstate commerce – one of the categories of Commerce Clause regulation recognized as valid in *Lopez v. United States* – and because it is an integral part of a larger scheme that regulates interstate economic activity. Based on what I know of the issue, I have no basis for disagreeing with those arguments.

59. Several commentators, including 9th Circuit nominee Goodwin Liu, have said that *Lopez* and *Morrison* are difficult or "incoherent" standards in outlining the limitations of the

Interstate Commerce Clause. Do you believe the cases provide adequate guidance in determining your answers to the previous questions?

ANSWER

It would not be consistent with the responsibilities and role of the Solicitor General for me to express a view about any particular decision of the Court or to state whether I agree with criticisms of those decisions. Respect for *stare decisis* and for the Court's precedents is an essential part of fulfilling the Solicitor General's responsibilities to the Court. If I am confirmed, whatever personal views I might have respecting *Lopez* and *Morrison* or any other legal issue will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, including *Lopez* and *Morrison*, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

I am generally familiar with the *Lopez* and *Morrison* decisions. The statute at issue in *Lopez* dealt with a law that prohibited possession of a firearm in the vicinity of a school, and the statute at issue in *Morrison* criminalized acts of gender-motivated violence. The noneconomic, criminal nature of the conduct at issue was central to the Court's conclusion in both cases that Congress had exceeded its Commerce power, as was the fact that in both cases the Court considered a stand-alone provision that was not part of a larger scheme of regulation of economic activity. In *Lopez* and *Morrison*, the Court sought to preserve "a distinction between what is truly national and what is truly local." Accordingly, the Court declined to sustain the regulation of noneconomic, criminal activity on the basis of highly attenuated connections to interstate commerce. Those precedents provide guidance as to the limits of Congress's power to regulate interstate commerce.

60. If a future President instructed the Solicitor General not to defend the individual mandate of the Patient Protection and Affordable Care Act and the Solicitor General followed the President's instructions, do you believe the Solicitor General's decision would be consistent with his or her duty to defend all statutes unless no reasonable argument could be advanced? Why or why not?

ANSWER

If a future Solicitor General were to be instructed by a future President to cease defense of the individual mandate (which is also referred to as the minimum coverage provision) in the Affordable Care Act, that Solicitor General would not have the authority to disobey or disregard such a command, for the reasons set forth in my response to Question 2 above. The Solicitor General would instead be faced with the question whether to carry out the order or to resign based on a conclusion that the instruction was based on partisan political considerations or other illegitimate reasons, or on an indefensible view of the law.

61. What principles of constitutional interpretation guide your analysis of whether a particular statute infringes upon an individual right?

- a. Is there any room in constitutional interpretation for the judge's own values or beliefs?

ANSWER (to Questions 61 and 61a)

For most of my career I was a litigator in private practice. While I did litigate constitutional law cases during that time, I was not an academic or a judge, and thus have not had occasion in my career to develop a fully formed theory of constitutional interpretation. I do believe interpretation of any provision of our Constitution should be based on the Constitution's text and structure, relevant contemporaneous history, and precedent interpreting the provision – and that the judge's own values and beliefs should play no role in the interpretive process.

- b. Do you believe that the Constitution, properly interpreted, confers a right to a minimum level of welfare?

ANSWER

The Supreme Court has not interpreted the Constitution to confer a right to a minimum level of welfare. *See, e.g., Dandridge v. Williams*. If I am confirmed, whatever personal views I might have respecting any legal issue, those views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

- c. Do you believe that the Constitution, properly interpreted, confers a right to engage in obscene speech?

ANSWER

The Supreme Court has held that the First Amendment does not confer a right to engage in obscene speech. If I am confirmed, whatever personal views I might have respecting any legal issue, those views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

62. On April 23, 2010, Arizona signed into law Senate Bill 1070, the "Support Our Law Enforcement and Safe Neighborhoods Act," which permitted Arizona police officers to

enforce certain federal immigration laws. On June 3, 2010, President Obama met with Governor Jan Brewer to discuss the law. Attorney General Holder and the Department of Justice filed suit against Arizona on July 6, 2010. The Justice Department argues the Arizona law is unconstitutional because it is preempted by federal law.

- a. Please explain fully your involvement in the decision to challenge Arizona's immigration law.

ANSWER

One function of the White House Counsel's Office is to advise the President and his senior advisors on important legal issues that the Administration confronts. As part of my responsibilities as Deputy Counsel to the President, I assisted the White House Counsel in carrying out that function. I participated in inter-agency deliberations about filing the lawsuit. My responsibilities also have included ongoing monitoring of the litigation, and ongoing consultation with attorneys in the Office of the Deputy Attorney General and the Office of the Attorney General.

- b. Do you personally agree with the Attorney General that the Arizona law is unconstitutional? If so, please explain fully your legal reasoning.

ANSWER

After appropriate deliberations among Executive Branch departments, the Attorney General authorized filing a challenge to the Arizona law. Any legal views or professional advice I may or may not have expressed as part of that process are confidential, and whatever personal views I might have respecting this or any other legal issue would play no role in the discharge of my obligations as Solicitor General.

- c. The district court has yet to reach the question of whether the Arizona law is constitutional. If the Justice Department does not prevail at the district court level, it may only appeal with the permission of the Solicitor General. If confirmed, and the Department does not prevail at the district court level, will you authorize an appeal?

ANSWER

The Ninth Circuit recently affirmed the District Court's decision to issue a preliminary injunction against enforcement of certain provisions of the Arizona law. There will presumably be further proceedings in the case, either in the Ninth Circuit or in the Supreme Court. Because the issue may come before me if I am confirmed, it would be both premature and inappropriate for me to comment upon this or any other particular appeal authorization in advance of a careful analysis of the lower court opinion and the necessary Executive Branch consultation and deliberation. If confirmed, I will make any decisions regarding this case on the basis of the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive

Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

63. Then-nominee Kagan said the "nation's traditional understanding [is] that the Constitution generally imposes limitations on government rather than establish[ing] affirmative rights and thus has what might be thought of as a libertarian slant." She said she "fully accept[s] this traditional understanding" and "would expect to make arguments consistent with it" if confirmed.

- a. What is your view of the Nation's "traditional understanding"? Is it similar or different from that expressed by Ms. Kagan?

ANSWER

My view is similar to the view Justice Kagan expressed.

- b. If confirmed, will you be consistent with your view of the Nation's "traditional understanding" when making arguments to the Supreme Court?

ANSWER

Yes.

64. How would you determine congressional intent in cases of statutory interpretation?

- a. What weight should be given to presidential signing statements when interpreting statutes?

- b. What weight should be given to legislative history and Committee Report language when interpreting statutes?

ANSWER (to Questions 64a and 64b)

If confirmed, I would follow Supreme Court precedent prescribing proper methods of statutory interpretation. Under those principles, if the text of a particular statutory provision (read in the context of the statute as a whole and with due regard for statutory structure), is clear then a court must enforce the clear meaning of the statute, and need not resort to legislative history to interpret the provision. If the meaning of the provision is not clear, then in the view of the majority (but not all) of the Justices on the Court, resort to legislative history, including Committee Report explanations, can be helpful to illuminate the meaning of the statutory text. From time to time the Supreme Court has referenced presidential signing statements in its

opinions, but it has never held that such statements should receive weight when interpreting statutes.

- c. What weight should be given to foreign law in statutory interpretation?

ANSWER

Unless Congress has incorporated foreign law or Supreme Court precedent dictates that foreign law should be considered, I would (if confirmed) give no weight to foreign law when presenting statutory interpretation arguments in court.

65. Then-nominee Kagan said she would “look at what *Congress* intended – not what either the President or foreign law says about the language in dispute” when determining congressional intent in cases of statutory interpretation. Do you agree? Why or why not?

ANSWER

I agree. The principal question in every case of statutory interpretation is what Congress intended when it enacted the law at issue.

66. In *Boumediene v. Bush*, the Supreme Court held that the detainees at the U.S. Naval Base at Guantanamo Bay, Cuba, “are entitled to the privilege of habeas corpus to challenge the legality of their detention.” Slip Op. at 42. The Court based its holding on Article I, Section 9, Clause 2, of the Constitution (the Suspension Clause), which allows for suspension of habeas corpus rights only in cases of rebellion or invasion. In *Al Maqaleh v. Gates*, 605 F.3d 84 (2010), the D.C. Circuit reversed the district court’s finding that the Suspension Clause reached detainees held at Bagram Air Base, 40 miles from Kabul, Afghanistan. Under the precedent of *Boumediene*, the D.C. Circuit Court reasoned that practical obstacles weighed against finding that the aliens could invoke the protections of habeas corpus. Specifically, the U.S. detained the aliens in an active war zone, and in territory under neither *de facto* nor *de jure* sovereignty of the U.S.

- a. Do you believe the D.C. Circuit correctly held that the constitutional right to habeas corpus did not reach detainees at Bagram Air Base in Afghanistan?

ANSWER

Just as I do not believe it would be appropriate for a Solicitor General nominee to express agreement or disagreement with a decision of the Supreme Court, I do not think it would be appropriate to express agreement or disagreement with a court of appeals decision, particularly one that may be subject to further litigation. If I am confirmed, it will be my responsibility to vigorously defend the position of the United States in this case irrespective of any personal views I might have on this or any other issue, and I will do so.

- b. Do you believe that U.S. constitutional rights apply to non-U.S. citizen detainees held by the U.S. Military on foreign soil? If so, please explain why?

ANSWER

The question of what constitutional rights, if any, may be asserted by non-citizens who are detained on foreign soil is an issue that may arise in litigation during my tenure if I am confirmed. If I am confirmed, whatever personal views I might have respecting this or any other legal issue will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

- c. If the detainees appeal this case to the Supreme Court, will you vigorously defend the United States' position, and the D.C. Circuit's opinion, that the Suspension Clause does not reach military bases like Bagram Air Base in Afghanistan?

ANSWER

Yes. Based on my understanding of the issues presented in this case, I can see no reason why I would not, if I were confirmed, be able to vigorously defend the position of the United States in this case.

67. Do you believe that the Supreme Court correctly decided *Kelo v. New London*?

ANSWER

In *Kelo* the Supreme Court addressed the question whether a municipality could, consistent with the Fifth Amendment Takings Clause, condemn private property as part of an overall economic development plan that resulted in the transfer of property from one private owner to another private owner who would put the property to a more economically beneficial use. The Court applied rational basis review based on "our longstanding policy of deference to legislative policy judgments in this field," and upheld the taking on the ground that the condemnation and transfer of the property "serves a public purpose." The dissenting Justices believed that the majority's decision departed from the constitutional text, which authorizes takings for "public use," which they believed to be a narrower category of justification than "public purpose."

It would not be consistent with the responsibilities and role of the Solicitor General for me to express a view about any particular decision of the Court or to state whether I agree with criticisms of those decisions. Respect for *stare decisis* and for the Court's precedents is an essential part of fulfilling the Solicitor General's responsibilities to the Court. In all events, if confirmed, whatever personal views I might have respecting any legal issue, those views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it – including *Kelo* – and my best judgment as to the long-term

institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

- a. In light of the widespread negative response to *Kelo*, should the federal government be more reluctant to exercise its power of eminent domain?

ANSWER

The question whether the federal government should be more reluctant to exercise its powers of eminent domain in light of the public response to *Kelo* is a question of public policy, not a legal question that would be confronted by the Solicitor General.

- b. If confirmed, how will you respect property rights while also defending a federal statutory taking?

ANSWER

If the federal government exercised powers of eminent domain authorized by statute, my responsibility as Solicitor General, if confirmed, would be to defend such an action against constitutional challenge under the Takings Clause (or any other constitutional provision) unless no reasonable arguments could be advanced in its defense. In the event that Congress enacted legislation that permitted a federal taking, as I assume that it would, with appropriate respect for constitutional property rights, reasonable arguments should exist to defend that legislation.

68. You authored a brief in *Cruzan v. Missouri Dept. of Health*, arguing that the state's interest in preserving life was inconsistent with our traditional understandings of the meaning of life.

- a. Do you stand by your brief in *Cruzan*?

ANSWER

In *Cruzan*, I filed an *amicus* brief for my client, the General Board of Church and Society of the United Methodist Church. In that brief, the Church expressed its view to the Supreme Court that a family's decisions regarding the agonizing issue of whether to withdraw life-sustaining medical care from a person in a permanent vegetative state should – consistent with what the Church described as “the deeply held ethical principles of this nation's Judeo-Christian tradition” – be entitled to recognition under the Fourteenth Amendment as a fundamental value consistent with the traditions and practice of the American people.

During my career in private practice I represented a wide variety of clients in cases raising a wide variety of legal and policy issues. I represented the interests of those clients vigorously on the basis of sound legal arguments and without regard to my own views of what the law should

be. That is at the core of what it means for a lawyer to represent a client. I understand that, if confirmed, I will have a special obligation to represent the interests of the United States with vigor and to the best of my ability even if doing so conflicts with my own opinion in a particular matter. And I will do so.

b. Could the federal government properly assert an interest in preserving life?

ANSWER

Yes, assuming the federal government does so pursuant to one of its enumerated powers under the Constitution.

c. If so, would you be willing to defend that interest in spite of your position in *Cruzan*?

ANSWER

Yes. If I am confirmed, whatever personal views I might have respecting any legal issue – and whatever the views of my former clients – those views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it – including *Cruzan* and its progeny – and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General’s Office regularly undertakes in order to determine the interests of the United States).

69. Do you believe that the Supreme Court’s decision in *Zelman v. Simmons-Harris*, which held that school-choice programs that include religious schools do not violate the Establishment Clause, was correctly decided?

ANSWER

In *Zelman v. Simmons-Harris*, the Supreme Court held that a school voucher program did not violate the Establishment Clause of the First Amendment because it had a legitimate secular purpose (improving the quality of education for poor children irrespective of religious views) and it neither advanced nor inhibited religion. The voucher program allowed parents to choose to use vouchers for religious or nonreligious private schools for their children, without any constraints or inducements by the government that would favor or inhibit the use of vouchers to finance attendance at religious schools. *Zelman* is consistent with Supreme Court Establishment Clause precedents upholding governmental aid programs that are neutral in that they provide assistance to religious and nonreligious institutions alike.

It would not be consistent with the responsibilities and role of the Solicitor General for me to express a view about any particular decision of the Court or to state whether I agree with criticisms of those opinions. Respect for *stare decisis* and for the Court’s precedents is an essential part of fulfilling the Solicitor General’s responsibilities to the Court. In all events, if I

am confirmed, whatever personal views I might have respecting any legal issue, those views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it – including *Zelman* and other Establishment Clause precedents – and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General’s Office regularly undertakes in order to determine the interests of the United States).

70. In a 1996 law review article entitled “Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine,” then-Professor Elena Kagan stated, “Laws directed at equalizing speech thus join the list of laws that, although facially content neutral, demand strict scrutiny because of the heightened concerns relating to improper purpose.”<sup>2</sup> What level of scrutiny do you believe the “Fairness Doctrine,” if revived, should be subject to under the First Amendment?

ANSWER

If Congress were to re-institute the “fairness doctrine” as a statute, then it would be my responsibility, if confirmed as Solicitor General, to defend the provision against constitutional attack unless no reasonable argument could be offered in defense of the provision (or unless it were to violate the separation of powers). Without knowing exactly what requirements the law would impose, and without benefit of legislative history and/or a developed administrative record to shed light on Congress’s objectives and the empirical support for Congress’s decisions, it is not possible to assess what standard of review should apply. In all events, if I am confirmed, whatever personal views I might have respecting any legal issue, those views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General’s Office regularly undertakes in order to determine the interests of the United States).

71. The Supreme Court has held the Federal Sentencing Guidelines are advisory and persuasive, but not binding.

a. Do you believe *Booker* and *Fanfan* were correctly decided?

ANSWER

It would not be consistent with the responsibilities and role of the Solicitor General for me to express a view about any particular decision of the Court or to state whether I agree with criticisms of those opinions. Respect for *stare decisis* and for the Court’s precedents is an essential part of fulfilling the Solicitor General’s responsibilities to the Court. In any event, if I

<sup>2</sup> Elena Kagan, “Private Speech, Public Purpose; The Role of Governmental Motive in First Amendment Doctrine,” 63 U. Chi. L. Rev. 413, 472 (1996).

am confirmed, whatever personal views I might have respecting any legal issue, those views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

- b. Do you believe that the Guidelines are unnecessarily harsh on certain offenders?

ANSWER

I represented the Washington Legal Foundation as *amicus curiae* in a case in which the Foundation expressed its view that the Federal Sentencing Guidelines are unnecessarily harsh on certain offenders. If I am confirmed, whatever personal views I might have respecting any legal issue, those views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

- c. If so, which offenders do you believe the Guidelines treat unfairly?

I believe my answer to Question 71b answers this question.

72. I am a strong advocate of whistleblower protection. The False Claims Act establishes a partnership between public law enforcers and the public taxpayers. Government officials cannot cut down on fraud alone. You are familiar with the False Claims Act from your representation of Comstock Resources in *Comstock Resources v. Kenard*, 545 U.S. 1139 (2005) (cert. denied).

- a. If confirmed, how will you ensure that congressional intent behind the F.C.A. is upheld?

ANSWER

According to Department of Justice statistics, the False Claims Act results in the return of billions of dollars annually to the federal treasury. As the text of the law makes clear, and the Department's statistics confirm, the Act's *qui tam* provisions are indispensable to promoting the statute's goals. If I am confirmed, my judgments as Solicitor General will certainly be informed by an understanding of Congress's intent in the False Claims Act, of the vital public policy objectives the Act promotes, and of the importance of vigorous enforcement of the Act.

- b. If confirmed, what steps will you take to vigorously defend constitutional challenges to the F.C.A.?

ANSWER

Like all congressional enactments, all provisions of the False Claims Act are entitled to a strong presumption of constitutionality. Although I have not studied the issue, I can think of no reason why I would not pursue a vigorous defense of the Act's constitutionality if I were confirmed as Solicitor General.

73. Recent lawsuits allege that the seal provision of the False Claims Act, codified at 31 U.S.C § 3730(b)(2), is unconstitutional. That provision requires that False Claims Act cases by *qui tam* relators be filed *in camera* and remain under seal for at least 60 days, and not be served upon the defendant until the court so orders. This provision was designed to give the Government ample time to investigate an allegation before making the case public, while protecting evidence and the whistleblowers from undue harm or influence. The other benefit of the seal provision is that it permits frivolous complaints to remain under seal without causing harm to a defendant. However, prolonged extensions of the seal threaten to undermine its value and purpose. A divided Fourth Circuit recently ruled that the sealing provision does not violate the public's right to access court proceedings because of the government's compelling interest in protecting the integrity of these investigations. *See ACLU v. Holder*, 2011 WL 1108252 (March 28, 2011). I believe the Justice Department should use the seal judiciously and not abuse its discretion. I also believe some transparency on the part of the Department would go a long way to dispelling questions about the seal. Nonetheless, I believe the seal performs a valuable function, particularly in protecting whistleblowers against retaliation.

- a. Do you believe the seal provision of the False Claims Act is unconstitutional? Why or why not?
  
- b. What steps will you take to vigorously defend this provision of the statute?

ANSWER (to Questions 73a and 73b)

Like all congressional enactments, the seal provision of the False Claims Act is entitled to a strong presumption of constitutionality. Although I do not have any particular knowledge of the Act's seal provision and I have not studied the issue, I can think of no reason why I would not continue with the vigorous defense of the provision's constitutionality if I were confirmed as Solicitor General. If I am confirmed, whatever personal views I might have respecting any legal issue, those views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

74. How do you define judicial activism?

ANSWER

Judicial activism is a term that means different things to different people. As a litigator, I have not found the term to be a useful one.

75. Do you agree with the view that the courts, rather than the elected branches, should take the lead in creating a more just society?

ANSWER

No. It is the elected branches of government that should decide and execute policy.

76. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), in which the Supreme Court held that a right to assisted suicide was not protected by the Due Process Clause, the Court reasoned:

“[W]e have always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this uncharted area are scarce and open-ended. By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore ‘exercise the utmost care whenever we are asked to break new ground in this field,’ lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court.”

a. Do you agree with the Court’s assessment of the importance of public debate and legislative action?

ANSWER

Yes.

b. The *Glucksberg* decision has proven to be a case that stimulated healthy debate amongst the states. As Solicitor General, will you argue for more reserved rulings such as the *Glucksberg*, which support the states’ efforts and legislative action as the proper way to effect change?

ANSWER

If confirmed, I anticipate that I might have occasion to invoke the fundamental point of *Glucksburg* – the respect due to the judgments of the democratically elected branches of government, informed by robust public debate – in cases defending congressional enactments against constitutional challenge. When state legislation is at issue before the Supreme Court, the Solicitor General’s office has more discretion than it does with federal issues to decide what position (if any) to take. And that discretion would be informed, first and foremost, by an assessment of the long-term institutional interests of the United States. But the principles of *Glucksburg* stated above could well inform that analysis in an appropriate case.

77. Do you agree with then-nominee Kagan’s statement that “an important consideration for the [Solicitor General’s] office to take into account is the degree to which the courts, by staying their hand, can encourage experimentation and healthy debate among the states and their citizens”? If so, please explain why.

ANSWER

Yes. Doing so enhances the democratic process and respects the values of federalism.

78. Do you believe moral and ethical principles can provide a rational basis to support a law?

ANSWER

Yes.

79. Do you agree or disagree with Justice Holmes’s view of judicial restraint when it comes to second-guessing the legislature on morally inspired legislation, as articulated in *Lochner*?

ANSWER

I agree with the view Justice Holmes expressed in his *Lochner* dissent. In particular, I agree with his view that courts should be restrained in overturning the decisions of the democratically elected branches of government as reflected in duly enacted laws, including laws of the kind Justice Holmes identifies.

- a. How would you articulate your own view in this area, especially as it relates to your potential future role as the chief federal advocate before the Court?

ANSWER

If I am confirmed, one of my principal responsibilities will be to defend federal statutes when they are challenged as unconstitutional. The principle of judicial restraint articulated by Justice Holmes will be a key framing principle in presenting arguments in defense of congressional enactments.

80. Do you believe the Supreme Court correctly decided *District of Columbia v. Heller*?

ANSWER

The Supreme Court held in *District of Columbia v. Heller* that the Second Amendment guarantees an individual right “to possess and carry weapons in case of confrontation.” In light of this individual right, the Court invalidated a statute banning handgun possession in the home. The Court also recognized, however, that “some measures regulating” firearms would be consistent with the existence of this Second Amendment right. In this respect, the Second Amendment right to bear arms is like other fundamental constitutional rights in that it provides strong but not unlimited protection.

If I am confirmed, whatever personal views I might have respecting any legal issue will play no role in the discharge of my obligations. *Heller* – and the Second Amendment right it guarantees – is settled law. I also recognize that it will be the responsibility of the Solicitor General’s office to defend against constitutional challenge federal statutes and regulations involving firearms for which reasonable arguments can be made. My decisions will be based on the law as the Supreme Court has determined it, including *Heller*, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General’s Office regularly undertakes in order to determine the interests of the United States).

81. Do you believe the individual right to keep and bear arms is a fundamental right?

ANSWER

In *McDonald v. City of Chicago*, the Supreme Court recognized that the individual’s Second Amendment right to bear arms recognized in *Heller* is a fundamental right, and is therefore incorporated against the States under the Fourteenth Amendment. If I am confirmed, whatever personal views I might have respecting any legal issue will play no role in the discharge of my obligations. *Heller* and *McDonald* – and the Second Amendment right they guarantee – are settled law. I also recognize that it will be the responsibility of the Solicitor General’s office to defend against constitutional challenge federal statutes and regulations involving firearms for which reasonable arguments can be made. My decisions will be based on the law as the Supreme Court has determined it, including *Heller* and *McDonald*, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive

deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

82. The Supreme Court held in *Heller* that the Second Amendment protects an individual's right to possess a firearm, regardless of their participation in a "well regulated militia." In 2009, the U.S. Supreme Court expanded that right in *McDonald v. Chicago* by finding that the Due Process Clause of the Fourteenth Amendment incorporated the Second Amendment. What is your personal opinion of the rights afforded by the Second Amendment?

ANSWER

If I am confirmed, whatever personal views I might have respecting any legal issue will play no role in the discharge of my obligations. *Heller* and *McDonald* – and the Second Amendment right they guarantee – are settled law. I also recognize that it will be the responsibility of the Solicitor General's office to defend against constitutional challenge federal statutes and regulations involving firearms for which reasonable arguments can be made. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

83. If you are confirmed, will you commit to protect an individual's right to possess a firearm?

ANSWER

Yes. If confirmed, I will respect *Heller* and *McDonald* as binding Supreme Court authority that guarantees an individual Second Amendment right to bear arms.

84. Both *Heller* and *McDonald* dealt with the individual right to possess a firearm. The Court specifically declined to consider whether non-enumerated rights were implicated, since the Second Amendment provided a clear enumeration of the right. *McDonald*, in incorporating the Second Amendment and applying it to the states, held that the Due Process Clause, rather than the Privileges or Immunities Clause, incorporated the Second Amendment. In his concurrence, Justice Thomas urged incorporation based on the Privileges or Immunities Clause.

- a. Do you believe that the 9th Amendment can be a source of rights, or is it merely an "inkblot" as Robert Bork famously said?

- b. Should the Court reconsider its jurisprudence on the Privileges or Immunities Clause? Please provide your personal and professional opinion, notwithstanding the status of the *Slaughterhouse Cases*.
- c. If you believe that either the 9th or 14th amendments provide separate sources of rights, please elaborate on what those rights are.

ANSWER (to Questions 84a, 84b, and 84c)

For most of my career I was a litigator in private practice. While I did litigate constitutional law cases during that time, I do not believe I ever had a case raising a Ninth Amendment issue or an issue under the Privileges or Immunities Clause of the Fourteenth Amendment. I was not an academic or a judge, and thus have not had occasion in my career to develop a fully formed theory of constitutional interpretation or of these particular constitutional provisions. Moreover, any answer I might give to this question would inevitably be a comment on existing Supreme Court precedent, and it would not be consistent with the responsibilities and role of the Solicitor General for me to express a view about any particular decision of the Court or to state whether I agree with criticisms of those opinions. Respect for *stare decisis* and for the Court's precedents is an essential part of fulfilling the Solicitor General's responsibilities to the Court. In all events, if I am confirmed, whatever personal views I might have respecting any legal issue will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

- 85. You served as counsel of record in an *amicus* brief filed by the Coalition to Stop Gun Violence in *Printz v. U.S.*, 521 U.S. 898 (1997). You argued that the Brady Act did not violate the principles of federalism and state sovereignty. You also argued that the law "must be upheld because the compelling federal interest in immediately addressing the epidemic of handgun violence greatly outweighs the minimal and temporary obligations placed on the states." The Supreme Court decided the Brady Act violated the principles of federalism, state sovereignty and the 10th Amendment.
  - a. Considering your history on this subject, what steps will you undertake to ensure that you zealously represent the United States in *all* laws, including the individual right to possess a firearm, if confirmed?

ANSWER

*Printz v. United States* did not raise any issue respecting the Second Amendment right to bear arms. The issue in the case was whether Congress violated the Tenth Amendment by enacting a statute that required state governments to administer a background check system for an interim period until a federally administered system was operational. If I am confirmed, whatever personal views I might have respecting any legal issue – and whatever the views of my former

clients might have been – those views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it – including the Court’s decisions in *Printz*, *Heller*, and *McDonald*, which are settled law – and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General’s Office regularly undertakes in order to determine the interests of the United States).

- b. If confirmed, will your representation before the Supreme Court demonstrate respect for our shared values of federalism, separation of powers, and state sovereignty? Please explain.

ANSWER

If confirmed, I will base my decisions on the law as the Supreme Court has determined it, including the Court’s precedents on federalism, separation of powers, and state sovereignty. Of course, a Solicitor General has a responsibility to defend acts of Congress for which reasonable arguments can be made, and that responsibility includes cases in which the a federal statute is challenged on Tenth Amendment grounds or other grounds reflecting interests in federalism and state sovereignty.

86. Do you believe that the Supreme Court’s decision in *Morrison v. Olson*, which ruled that the independent-counsel statute did not violate the constitutional separation of powers, was correctly decided?

ANSWER

In *Morrison v. Olson*, the Supreme Court held that the independent counsel provisions of the Ethics in Government Act of 1978 – which insulated the independent counsel from the direct control of the President – did not violate the Constitution’s separation-of-powers principles. Specifically, the Court held that “although the counsel exercises no small amount of discretion . . . we simply do not see how the President’s need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.”

It would not be consistent with the responsibilities and role of the Solicitor General for me to express a view about any particular decision of the Court or to state whether I agree with criticisms of those opinions. Respect for *stare decisis* and for the Court’s precedents is an essential part of fulfilling the Solicitor General’s responsibilities to the Court. If I am confirmed, whatever personal views I might have respecting any legal issue will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General’s Office regularly undertakes in order to determine the interests of the United States).

I recognize that in *Morrison*, the Solicitor General's Office argued against the constitutionality of the independent counsel law on the ground that it violated the separation of powers by impermissibly limiting the President's control over executive personnel and functions. *Morrison* thus implicates one of the traditional exceptions to the responsibility of the Solicitor General to defend congressional enactments. Nevertheless, *Morrison* is settled law.

87. There have been only a few instances where the Supreme Court has ruled a law violated the 10th Amendment. See *Printz v. United States*, 521 U.S. 898 (1997); see also *New York v. United States*, 505 U.S. 144 (1992). If confirmed, how will you evaluate acts of Congress to ensure they do not offend the 10th Amendment, or other constitutional amendments, before proceeding with a defense?

ANSWER

If confirmed, I will base my decisions regarding the defense of statutes on the law as the Supreme Court has determined it, including the Court's precedents on federalism, separation of powers, and state sovereignty. Of course, a Solicitor General has a responsibility to defend acts of Congress for which reasonable arguments can be made, and that responsibility includes cases in which the a federal statute is challenged on Tenth Amendment grounds or other grounds reflecting interests in federalism and state sovereignty.

88. Do you believe that the Supreme Court's decision in *Boumediene v. Bush*, which conferred constitutional habeas rights on aliens detained as enemy combatants at Guantanamo, was correctly decided?
- a. If yes, how does that square with *Johnson v. Eisentrager*, which Justice Scalia, in his *Boumediene* dissent, said "held—held beyond any doubt—that the Constitution does not ensure habeas for aliens held by the United States in areas over which our Government is not sovereign"?

ANSWER (to Questions 88 and 88a)

It would not be consistent with the responsibilities and role of the Solicitor General for me to express a view about any particular decision of the Court or to state whether I agree with any of the opinions in the case or criticisms of those opinions. Respect for *stare decisis* and for the Court's precedents is an essential part of fulfilling the Solicitor General's responsibilities to the Court. Moreover, if I am confirmed, whatever personal views I might have respecting any legal issue those views will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it – including *Boumediene* and *Johnson v. Eisentrager* – and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

89. The Attorney General recently announced that the 9/11 co-conspirators, including Khalid Sheikh Mohammed, will be tried in military tribunals at Guantanamo Bay, and not in Article III courts. In 2009, the President said, “[What] I think we have to break is this fearful notion that somehow our justice system can’t handle these guys.” On April 4, 2011, the Attorney General said, “After thoroughly studying the case, it became clear to me that the best venue for prosecution was in federal court. I stand by that decision today.” Clearly, the Attorney General still believes that Article III courts are the appropriate venue for prosecution of the 9/11 co-conspirators, but because Congress encroached upon a “unique executive branch function,” he must settle for military tribunals.

- a. If confirmed, will you vigorously defend the United States’ authority to try the 9/11 conspirators in military tribunals, notwithstanding the statements made by the President and Attorney General in opposition to this venue?

ANSWER

Yes. If I am confirmed, my responsibility as Solicitor General would be to defend convictions, whether they are obtained in military tribunals or in Article III courts. Both the President and the Attorney General have expressed support for using both fora as necessary tools in this effort, but my responsibility will not include deciding what forum is appropriate for a prosecution. I will vigorously defend the authority of the United States to bring prosecutions under the Military Commissions Act of 2009, as well as the authority of the United States to bring prosecutions in Article III tribunals.

- b. If the President or Attorney General instructs you not to do so, what will you do?

ANSWER

If I am confirmed, and I am defending challenges to a conviction obtained in a Military Commission proceeding, it will be because the Attorney General has directed that the defendant be prosecuted in a Military Commission. Therefore, it is difficult to conceive of a situation in which the President or the Attorney General would issue an instruction not to defend. In the exceedingly unlikely event that I received such an instruction, if the instruction was based on what I believed to be partisan political considerations or other illegitimate reasons, or was based on what I believed to be an indefensible view of the law, I would not lend my name or that of the Office of the Solicitor General to carrying out the order, and would certainly resign rather than carry out the order.

90. Please describe your experience in the entire nomination selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). List the dates of all interviews you had with the President and White House or Justice Department staff. Do not include any contacts with the Federal Bureau of Investigation personnel concerning your nomination.

ANSWER

I was informed in June 2010 by White House officials that I was one of several candidates under consideration for the position. I was interviewed by a group of Executive Branch officials during August 2010. I was informed that I would be the nominee in January 2011. I do not know the details of the selection process.

91. Has anyone involved in the selection process discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

ANSWER

No.

92. Have you participated, at either the White House or the Justice Department, in any strategy discussions related to defending the constitutionality of the Patient Protection and Affordable Care Act? If so, please provide details, including with whom you met or discussed the issue, and when.

ANSWER

One function of the White House Counsel's Office is to advise the President and his senior advisors on important legal issues that the Administration confronts. As part of my responsibilities as Deputy Counsel to the President, I assisted the White House Counsel in carrying out that function. Those responsibilities included ongoing monitoring of the litigation challenging the constitutionality of the Affordable Care Act, and ongoing consultation with attorneys in the Office of the Deputy Attorney General and the Office of the Attorney General in the Department of Justice, attorneys in the Office of the General Counsel of the Department of Health and Human Services, and attorneys in the Department of the Treasury in connection with that litigation.

93. It has been reported that Associate Attorney General Thomas J. Perrelli, the third ranking official in the Justice Department, had to recuse himself on at least 13 active detainee cases and at least 26 cases listed as closed or mooted because Mr. Perrelli's former firm, Jenner & Block LLP, worked on behalf of detainees while he served on the firm's management committee and on its appellate and Supreme Court practice groups.
- a. What role did you play in the representation of David Hicks?

ANSWER

I did not play any role in the representation of David Hicks, although other lawyers at my former law firm, Jenner & Block, did assist military counsel in representing Mr. Hicks. I understand that my name is listed in the official court docket as one of his counsel. I do not know why that is so; it may be because I initially agreed to supervise the lawyers handling the case when the firm first agreed to provide assistance to military counsel. I did not actually participate in the case, and I have verified that Jenner & Block's billing records do not reflect that I billed any time to the case.

- b. While at Jenner & Block, did you perform any legal work on behalf of any other terrorist detainees held at Guantanamo Bay or elsewhere?

ANSWER

I did not perform any legal work representing any other such detainee while at Jenner & Block. I devoted approximately 12 hours of time serving as co-counsel on an *amicus* brief filed in the U.S. Court of Appeals for the Second Circuit in the case of *Padilla v. Rumsfeld*. The case was filed on behalf of a group of retired federal judges and human rights lawyers. It addressed the issue of Padilla's entitlement to habeas corpus and to have the right to communicate with and be represented by to counsel to assist in the habeas proceeding.

- c. During your employment at the Department or at the White House Counsel's Office over the past two years, have you recused yourself on any detainee cases or policy deliberations?

ANSWER

Because of my involvement representing *amici* in the *Padilla* case, I am and have been recused from matters that involved the civil or criminal litigation in which Padilla was a party, including policy deliberations, if any, that involved those cases.

94. In an October 20, 2010 New York Times op-ed, former acting Solicitor General Walter Dellinger wrote:

"[T]he government has an obligation to comply with the nation's laws, regardless of whether the president agrees with a particular statute. Doing otherwise would also set a precedent justifying similar nullifications by future administrations."

- a. Please explain your agreement or disagreement with the first sentence.

ANSWER

I believe Mr. Dellinger was explaining his view that the Executive Branch has an obligation, except in rare instances, to enforce existing law whether or not the President agrees with the law or believes it to be unconstitutional. I agree with that view.

- b. Does the President's decision not to defend the Defense of Marriage Act establish the precedent Mr. Dellinger describes?

ANSWER

Mr. Dellinger was drawing a distinction between refusing to enforce a law (which could have the effect of nullifying it) and continuing to enforce a law while declining to defend it against constitutional challenge (which Mr. Dellinger believes can be appropriately respectful of the co-equal branches of government because the law continues to be executed while judicial challenge proceeds, and because continued enforcement provides courts with an opportunity to have the last word, as they should, on the constitutionality of the law). The President and the Attorney General have instructed that the Executive Branch will continue to enforce Section 3 of the Defense of Marriage Act pending a final judicial determination of its constitutionality. As explained in the Attorney General's February 23, 2011 letter to Speaker Boehner pursuant to 28 U.S.C. § 530D, the Executive Branch is continuing to enforce Section 3 of DOMA and the President has instructed Executive Branch agencies to continue to enforce Section 3. Therefore, the decision of the President and the Attorney General does not establish the precedent that Mr. Dellinger describes.

- c. Mr. Dellinger used the following example: "The next president might, for example, decide not to enforce the recent health care reform law; all he would need would be a single ruling against the law by a single district court judge, which he would then refuse to appeal." Are you aware of any discussions within the White House or the Department of Justice regarding the possibility of a future Administration not defending the health care reform law?

ANSWER

No.

- d. Mr. Dellinger also wrote "Presidents in rare instances can determine that a law is unconstitutional and decline to comply with it. But a 1994 opinion by the Office of Legal Counsel (where I was the head) concluded that a president can do so only under very special circumstances, including a conclusion on his part that it is 'probable' that the Supreme Court would agree with him."
- i. Please describe the special circumstances referred to by Mr. Dellinger.

ANSWER

The special circumstances referred to by Mr. Dellinger are set forth in the 1994 OLC opinion concerning when the Executive may decline to enforce (as opposed to defend the constitutionality of) a federal statute. The 1994 OLC opinion in turn references Supreme Court precedent and other Department of Justice authorities, including a 1980 opinion by Attorney General Civiletti. Drawing on these authorities, the 1994 OLC opinion concludes that “the President, exercising his independent judgment, determines both that a provision would violate the Constitution and that it is probable that the Court would agree with him, the President has the authority to decline to execute the statute.” In exercising such authority, the OLC opinion explains that such a decision is “necessarily specific to context, and it should be reached after careful weighing of the effect of compliance with the provision on the constitutional rights of affected individuals and on the Executive Branch’s constitutional authority. Also relevant is the likelihood that compliance or non-compliance will permit judicial resolution of the issue. That is, the President may base his decision to comply (or decline to comply) in part on a desire to afford the Supreme Court an opportunity to review the constitutional judgment of the legislative branch.”

- ii. Please explain how these special circumstances apply or do not apply to the DOMA case.

ANSWER

Because the President and the Attorney General have made the decision that Section 3 of DOMA should continue to be enforced pending final resolution of the judicial proceedings challenging its constitutionality, the situation is not addressed by the special circumstances analysis Mr. Dellinger describes.

- iii. If confirmed as Solicitor General, what process and analysis would you undertake in applying these special circumstances?

ANSWER

Because the special circumstances Mr. Dellinger articulated would govern decisions whether to enforce a law, rather than to decisions whether to defend it, they would not be decisions within the responsibility of a Solicitor General. If confirmed and asked for my advice, I would advise the President to follow the analysis set forth in the 1994 OLC Opinion, as well as the Supreme Court authority and other Department of Justice authorities referred to in the Opinion.

- 95. In your opinion, if an Administration believes a federal statute is unconstitutional and a lower court strikes down that law, which is the better course of action: (a) simply permit the lower court’s decision to stand; or, (b) seek review of the lower court’s ruling and argue to the appellate and/or Supreme Court that the law is unconstitutional?

ANSWER

If the Department of Justice has determined that reasonable arguments can be made in defense of a statute's constitutionality, then the Department should defend the statute on appeal, and should neither permit an adverse decision to stand nor appeal and challenge the constitutionality of the law on appeal – with the exception of laws that violate the separation of powers, which the Department will not defend. If the Department has decided that it cannot defend a statute because there are no reasonable arguments that can be advanced in its defense (or because it violates the separation of powers), and is therefore not defending the statute, then the Department will notify Congress pursuant to 28 U.S.C. § 530D. In that situation, it may be necessary for the Department to file a notice of appeal from an adverse district court ruling (or to take other procedural steps) in order to provide Congress an opportunity to step in and defend the statute should it choose to do so. In other circumstances, such as cases involving independent agencies, the Department may also provide the independent agency with an opportunity to step in and defend the constitutionality of a statute, as occurred in 1990 in Supreme Court proceedings in *Metro Broadcasting Co. v. Federal Communications Commission*. If no entity steps in to defend the constitutionality of a statute, then I understand that the Department will typically discontinue appellate proceedings, as I believe occurred in the case of *ACLU v. Mineta* about which Paul Clement testified during his confirmation hearing. If an entity does step in to defend the constitutionality of a statute, then the Department will face a choice whether to forgo participation on the merits of the case or to affirmatively challenge the constitutionality of the law, as occurred in the Supreme Court in the *Metro Broadcasting* case and in *Lovett v. United States* in 1946. Finally, there may be circumstances in which the Department of Justice decides not to appeal for idiosyncratic litigation strategy reasons. For example, the constitutional question may present itself in a unique situation that raises a risk only that the statute will be held to be unconstitutional in narrow circumstances that do not compromise the statute's objectives; or the factual record may present the constitutional question in a particularly unfavorable light, such that an appeal could result in a broad adverse constitutional ruling.

Because these rare cases involve difficult and complex judgments, I do not believe it is possible for me to say that there is a single, better, course to follow in all circumstances.

- a. What are the risks and benefits of each approach?

ANSWER

I do not believe it is possible to provide a cost/benefit analysis of the multiple approaches in the abstract. The risks and benefits of following one or another of these approaches will depend critically on the specific context in which the issue arises. If confirmed, I would approach the question of how to proceed with an appeal by looking to the long-term institutional interests of the United States, taking account of the interests of all three branches of government.

- b. If confirmed as Solicitor General, what factors would you consider in determining which strategy to follow?

ANSWER

If confirmed, my decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

- c. If the President or Attorney General disagreed with your strategy, what approach would you take?

ANSWER

Unless overruled by the Attorney General or the President, I would follow the approach I believed was correct in the exercise of my independent judgment. If I were overruled, I could not defy an instruction from the Attorney General or the President. As I explained more fully in my response to Question 2 above, doing so would violate the rule of law. But I would not lend my name or that of the Office of the Solicitor General to carrying out an order that I believed to be based on partisan political considerations or other illegitimate reasons, or an indefensible view of the law, and would certainly resign rather than carry out the order. If I were to explain to the Attorney General or the President that I believed reasonable grounds existed to defend a statute and that I would not be able to carry out an order to cease defending the statute, I would expect that he would respect my judgment. But I would resign if he did not.

96. What is your understanding constitutional duty of the Executive to "take Care that the Laws be faithfully executed" as contained in Article II, § 3 of the U.S. Constitution? In particular, what specific duties and responsibilities are placed on the Solicitor General to ensure this duty is performed?

ANSWER

In the recent case of *Free Enterprise Fund v. PCAOB*, the Supreme Court reminded us that "Article II vests "[t]he executive Power . . . in a President of the United States of America," who must "take Care that the Laws be faithfully executed." Art. II, § 1, cl. 1; *id.* § 3. As the Supreme Court explained, "[i]n light of '[t]he impossibility that one man should be able to perform all the great business of the State,' the Constitution provides for executive officers to 'assist the supreme Magistrate in discharging the duties of his trust.'" *Id.* (quoting 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939)). To accomplish the legal business of the United States, the founding generation created the executive office of Attorney General in the Judiciary Act of 1789: "And there shall also be appointed a meet person, learned in the law, to act as attorney-general for the United States, who shall be sworn or affirmed to a faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments, and shall receive such compensation for his services as shall by law be provided." Judiciary Act of 1789, ch. 20,

sec. 35, 1 Stat. 73, 92-93 (1789). As an Executive Officer, the Attorney General therefore assists the President in the discharge of the “Take Care” obligation. By statute, the responsibility of the Solicitor General in turn is to “assist the Attorney General in the performance of his duties.” 28 U.S.C. § 505 (2006). Thus, the Solicitor General ultimately supports the President as an executive officer assisting in the discharge of the President’s “Take Care” duties.

97. Former Solicitor General Seth Waxman wrote an essay entitled “Defending Congress,” printed as a Faculty Publication by Georgetown Law School. *See also* 79 N. C. L. Rev. 1073-1088 (2001).

In that article, General Waxman notes that during the first 200 years following ratification of the Constitution, only 127 federal laws were struck down. Since about 1995, he notes that the practice of declaring federal laws unconstitutional has become almost “commonplace” or at least with increased frequency. Arguing that constitutional adjudication has undergone a paradigm shift, he asks “How does, and should, the shift affect the function of the Solicitor General?”

- a. Please provide a thoughtful response to General Waxman’s question.

ANSWER

In my judgment, the “paradigm shift” Seth Waxman discussed in the quoted passage does not alter the function or responsibility of the Solicitor General to defend federal statutes against constitutional challenge. That responsibility is a vitally important principle and a longstanding tradition of the Department of Justice, which affords appropriate respect to Congress as a co-equal branch of government by recognizing the strong presumption of constitutionality that attaches to congressional enactments. There are only two exceptions. The first is where a statute violates the separation of powers by infringing on the President’s constitutional authority. The second is where there are no reasonable arguments that can be offered in defense of a statute. These exceptions are narrow and they apply only in rare circumstances, and should be invoked only after the most grave and careful deliberation, and that remains true irrespective of the judicial pace of invalidation of congressional enactments.

To the extent courts become more active in subjecting acts of Congress to searching judicial scrutiny to test whether Congress has exceeded an enumerated Article I power or has exceeded the limits of the Tenth Amendment or principles of state sovereign immunity, then the defense of federal statutes will invariably occupy more of the time and resources of the Solicitor General’s Office. It bears noting, however, that the pace of judicial invalidation of congressional enactments has subsided somewhat in the years since Mr. Waxman wrote the article.

- b. General Waxman continues, describing the process as “Every year the Solicitor General must decide, one case at a time, what the interests of the United States are with respect to several thousand different cases in the federal and state courts. Should the United States appeal, or seek rehearing, or petition for certiorari, or file a brief amicus curiae, or intervene? What issues should the United States raise, and what arguments should it make? How should the law be interpreted or the doctrine

applied? The goal is for the United States to speak with one voice—a voice that reflects the interests of all three branches of government and of the people.”

- i. What is your view of the final sentence in this excerpt?

ANSWER

I agree with the statement.

- ii. Please explain how the interests of all three branches of government and of the people can be reflected when the Executive is seeking to declare an Act of Congress unconstitutional.
- iii. If this goal cannot be met (speaking with one voice), what would you do as Solicitor General to ensure the interests of all branches of government are reflected in the judicial process?

ANSWER (to Questions 97b.ii and 97b.iii)

As I discuss more fully in answers to Questions 43 and 44 above, often the many departments and agencies within the Executive Branch, and even offices within the Department of Justice, will have different and competing views about what the position of the United States should be in a particular case. If possible, the Solicitor General will reconcile differing views into a consensus position. But it may not always be possible to do so. In such cases, it will ultimately be up to the Solicitor General to decide what the litigating position of the United States will be. In making that decision, the interests of the legislative and judicial branches are also significant. Most simply put, Congress’s interest is in having its duly-enacted statutes defended, and the courts’ interest is in having a full and fair presentation from the government to allow a legally correct resolution of the dispute. The Solicitor General’s Office has a long tradition of representing the United States’ interests before the Supreme Court with the highest standards of candor and professionalism, and I will continue to uphold and preserve that approach to litigation if confirmed.

Although the United States is able to speak with one voice before the Supreme Court in the vast majority of cases, there are rare occasions when it is not possible for the Solicitor General to represent the interests of all three branches of the federal government. Those circumstances are reflected in the two exceptions to the traditional practice of the Department of Justice to defend federal statutes. The first exception is when the statute intrudes on Executive prerogatives in violation of the separation of powers. In that circumstance, the Solicitor General cannot represent the interests of all three branches of government because the interests of the two political branches diverge. In such cases, it is his or her responsibility, as an Executive Branch officer, to protect the interests of the Executive Branch. The second exception is where there is no reasonable argument in defense of the statute’s constitutionality. In that circumstance, the Solicitor General cannot represent the interests of all three branches of government because his or her responsibilities as an officer of the Supreme Court and fidelity to the rule of law are

paramount. Precisely because all three branches of government will not be speaking with one voice in these cases, it is critical that the Department of Justice, including the Solicitor General, approach these cases with an appropriate sense of gravity and an understanding – reflected in the strong presumption of constitutionality that every congressional enactment is afforded – of the need to ensure that the interests of all three branches of government are fully accounted for in the process of deciding what position the Department will take in litigation.

In 28 U.S.C. § 530D, Congress has recognized that there will be situations in which the Department of Justice will not defend the constitutionality of a statute. By providing for timely notice to the Congress that the Executive Branch will not defend a statute, Section 530D ensures that there will be an opportunity for the Congress, should it choose to do so, to participate in order to defend the constitutionality of the statute at issue. In addition, the Department of Justice traditionally has conducted itself in litigation in such situations in a manner that provides an opportunity for Congress to participate. If confirmed, I will follow these traditional practices.

- c. Another excerpt from General Waxman’s essay reads: “Simon Sobeloff reflected that ‘[t]he Solicitor General is not a neutral; he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case.... [N]ot to achieve victory, but to establish justice.’ Passages like that are inspirational. Perhaps they are even reassuring, because in a sense they mean that even when the Solicitor General loses a case, he wins. But they offer little in the way of practical guidance. Reflecting on his tenure, Francis Biddle wrote that, for the Solicitor General, ‘the client is but an abstraction.’”

- i. Who is the client of the Solicitor General?

- ii. Does the client change from case to case?

ANSWER (to Questions 97c.i and 97c.ii)

In the most fundamental sense, the Solicitor General’s client is the United States because the Solicitor General must determine what position to take in the Supreme Court on the basis of the long-term institutional interests of the United States as a whole – including the interests of all three branches of government – and not merely the interests of the particular department or agency that is the party in a particular case. In a formal sense, and often in a practical sense as well, the client of the Solicitor General does change from case to case. For example, in one case the party represented by the Solicitor General’s office may be the Federal Communications Commission and in another case it may be the Secretary of the Interior, or it may be a government official sued in his or her individual capacity in a constitutional tort suit. The particular views of the department or agency that is the party in the case may be entitled to particular weight in formulating the position of the United States in the case.

- iii. What are your thoughts on the notion that the client “is but an abstraction”?

ANSWER

I understand the view that the client is “an abstraction,” but, based on my reading and my conversation with former Solicitors General, that would not be my characterization. For the reasons described in the preceding answer, the Solicitor General has very concrete clients in the form of Executive Branch departments and agencies who may be parties to a case and whose views about what the litigating position of the United States should be in a particular case will often reflect considerable expertise and institutional history. But the Solicitor General’s relationship to those “clients” is quite different than the relationship of an attorney to clients in private practice. In representing clients in private practice, it is an attorney’s responsibility to inform the clients of what positions can be advanced in court consistent with the rule of law, and to provide the attorney’s best judgment as to what lines of argument would be most effective. Within the constraints of what the rule of law would allow, however, it is ultimately the decision of an attorney’s private clients what arguments to make and how to make them. In contrast, as I discussed in response to Questions 2 and 11 above, it is up to the Solicitor General to decide what the litigating position of the United States will be in the Supreme Court based on his or her independent judgment. Unlike a lawyer in private practice, the Solicitor General has the authority to modify or overrule the position the federal department or agency would like to present in the Supreme Court, and in fact has an obligation to do so if the long-term institutional interests of the United States require it.

- d. In pages 1076 – 1077 of his essay, General Waxman describes the process he experienced as Solicitor General. He discusses the memos, the meetings, the collaboration and recommendations. Please review those pages and answer the following questions:
- i. Why do you believe General Waxman does not include any consideration of political factors as part of the process?

ANSWER

I assume that is because Mr. Waxman believes – as do I – that partisan political considerations should play no role in the process of deciding what position the United States should take before the Supreme Court.

- ii. Why do you believe General Waxman does not mention consulting with the Attorney General or President on how or if to proceed?

ANSWER

I do not know why Mr. Waxman does not mention consulting with the Attorney General or the President in the passage on pages 1076-77. It may be because in the vast majority of cases handled by the Solicitor General’s office, the independent judgment of the Solicitor General is the last word on what the litigating position of the United States will be. But Mr. Waxman – like most of the Solicitor General nominees before this Committee – has recognized that consultation with the Attorney General or the President is appropriate in the most significant matters. For

example, in another passage in the same article referenced in this Question (on pages 1087-88), Mr. Waxman explained that before declining to defend the federal statute in *Dickerson v. United States*, he and the Attorney General “discussed our conclusion with the President and he agreed.” Also, during his remarks at a symposium in honor of Rex Lee at Brigham Young Law School, Mr. Waxman made the following statement:

I felt entirely free, when something of the magnitude of *Dickerson* or *Piscataway* arose to ask for some of [the President’s] time. The point was not to ask him what on earth the United States should do. That’s a decision in the first instance for the solicitor general to make. The purpose of the meeting was to make sure, given how important the issues were, that the position we proposed to take represented an appropriate exercise of his constitutional authority. It is, after all, *his* constitutional authority, not the solicitor general’s or the attorney general’s. 2003 B.Y.U. Law Review 163 (2003).

At his confirmation hearing, Mr. Waxman stated: “[I]t is my decision, unless I am overruled by a higher authority, to take an independent look and determine, A, whether it is constitutionally permissible to advocate that policy, and, B, where and when it is desirable to do so. And those are my independent responsibilities, as I understand it, and I am very confident that the President expects me to exercise that independent responsibility.” In testimony at his confirmation hearing, Kenneth Starr similarly stated that “the President clearly does have ultimate executive responsibility under our system of laws, and at times it is appropriate, entirely appropriate for the President to . . . become involved in a particular matter if it is a matter of great moment.”

- iii. What do you think he meant by the statement, “The process always involves the Solicitor General’s independent evaluation of the relative importance of each case and the cost of pursuing it”?

#### ANSWER

In this passage, Seth Waxman was discussing the decision by a Solicitor General to authorize an appeal from a lower court decision adverse to an agency or department of the United States government, or to authorize the filing of a petition for certiorari to the Supreme Court. These are two of the Solicitor General’s responsibilities set forth in 28 C.F.R. § 0.20, the provision – discussed in response to Question 2 above. As Mr. Waxman explains in the article, the Solicitor General does not routinely authorize appeals when the federal government loses at the trial level, and the Solicitor General authorizes the filing of petitions for certiorari in only a fraction of the cases in which the federal government has lost in the courts of appeals. In the quoted passage, Mr. Waxman was explaining the basis on which he made the judgment whether to authorize an appeal or a petition for certiorari. If confirmed as Solicitor General, I would follow the same approach.

- iv. If you are confirmed as Solicitor General, what evidence can you point to that you will be able to provide an independent evaluation of each case?

ANSWER

I provided the Committee with my assurance, at the hearing and again in my written testimony, that I will exercise independent judgment in fidelity to the rule of law. Beyond that, I can only say that throughout my more than 20 years in private practice and my two years of public service in the Executive Branch I have always endeavored to conduct myself with personal and professional integrity and to show the greatest fidelity to the rule of law and reverence for our Constitution. The letters submitted in support of my nomination (from former Solicitors General Fried, Starr, Days, Dellinger, Waxman, Olson, Clement and Garre, from leaders of the appellate bar who know me and my work, and from the general counsels of corporations I have represented and opposed) may provide some measure of confidence that my assurances are reliable.

98. General Waxman ends his essay with the following paragraph:

“Any decision not to defend the constitutionality of an Act of Congress tests the mettle of the Solicitor General. That is as it should be. Confronting issues of such moment, I took instruction and solace from Francis Biddle, who observed, following his own tenure in office that, so long as the Solicitor General maintains fidelity to the rule of law, he ‘has no master to serve except his country.’ This country is quite a master. And what a privilege it was to be its servant.”

- a. You testified that if confirmed, you would be subject to the direction of the Attorney General and the President. How does this square with the notion that the Solicitor General has no master to serve except his country?

ANSWER

I agree with Mr. Waxman, and I do not believe there is any difference between the view he expresses in this quotation and my position. As Mr. Waxman stated in this quotation, a case may arise in which fidelity to the rule of law will require a Solicitor General to conclude that a congressional enactment cannot be defended under the Constitution (for Mr. Waxman it was the decision not to defend 18 U.S.C. § 3501(a) in *Dickerson v. United States*, which he was discussing in this passage), and a Solicitor General must have the mettle to maintain fidelity to the rule of law despite political pressure in that situation. Or a situation may arise in which fidelity to the rule of law will require a Solicitor General to conclude that a congressional enactment should be defended, and a Solicitor General must have the mettle to maintain fidelity to the rule of law despite political pressure in that situation as well. Nevertheless, as you pointed out at the hearing to consider Kenneth Starr’s nomination for Solicitor General: “it is important for us to keep in mind that the holder of this post serves at the pleasure of the President of the United States. By Constitution and statute, he owes his allegiance to the Executive Branch. As an officer of the Executive Branch, the Solicitor General exercises authority only as delegated by the Attorney General.” Therefore, as I set forth more fully in response to Question 2 above and as other Solicitor General nominees have recognized in their testimony before this Committee, if confirmed I will be subject to the direction of the Attorney General.

I expect that the Attorney General will respect my exercise of independent judgment and I will of course make my decisions based on my independent judgment. But as Charles Fried testified at his hearing, the Attorney General “does not have to accept that judgment. He has got to make his own judgments, and that means that there will be occasions – there always have been and there will continue to be – on which the Attorney General, in rare cases, concludes that the judgment that his Solicitor General has given him is a judgment with which he does not concur, and in that event, he has the clear statutory authority to direct the Solicitor General to take a contrary position. There is no doubt about that.” Fidelity to the rule of law would preclude any Solicitor General from defying a direction from the Attorney General. But, as I have also explained, if the Attorney General or the President were to overrule a decision by me as Solicitor General, and the decision is based on what I believe to be partisan political considerations or other illegitimate reasons, or on what I believe to be an indefensible view of the law, I would not lend my name or that of the Office of the Solicitor General to carrying out the order, and would certainly resign rather than carry out the order. That is how I will serve no master except my country.

- b. Do you feel that being deferential or subservient to the President and/or the Attorney General would ever conflict with maintaining fidelity to the rule of law? If so, what would you do - maintain fidelity to the rule of law or defer to the President and/or Attorney General? If your answer is maintaining fidelity, how would you accomplish that?

ANSWER

I believe my answer to Question 98a provides a response to this Question. To be clear, if confirmed as Solicitor General, I would maintain fidelity to the rule of law rather than defer to the Attorney General or the President if I believed their directive were based on partisan political considerations or other illegitimate reasons, or on what I believe to be an indefensible view of the law.

- c. If you are confirmed as Solicitor General, who will make any decision not to defend the constitutionality of an Act of Congress? You, the Attorney General or the President?

ANSWER

I believe my answer to Question 98a provides a response to this question. To be clear, if confirmed as Solicitor General, I will decide whether a statute should be defended in the exercise of my independent judgment. I do not expect that the Attorney General or the President will override my judgment. Nevertheless, my judgment, like that of any Solicitor General, could be overruled by the Attorney General or the President. Fidelity to the rule of law would preclude any Solicitor General from persisting with the defense of a statute in defiance of a direction from the Attorney General or the President. But, as I have explained, if the Attorney General or the President were to overrule a decision by me as Solicitor General, and the decision is based on what I believe to be partisan political considerations or other illegitimate reasons, or on what I

believe to be an indefensible view of the law, I would not lend my name or that of the Office of the Solicitor General to carrying out the order, and would certainly resign rather than carry out the order.

- d. Do you have the “mettle” to make such a decision independent of the Attorney General or President? If yes, what evidence can you provide – have you done so in the past?

ANSWER

If confirmed, I will exercise independent judgment in fidelity to the rule of law on all matters, including decisions whether to defend congressional enactments. If the Attorney General or the President were to overrule a decision by me as Solicitor General, and the decision is based on what I believe to be partisan political considerations or other illegitimate reasons, or on what I believe to be an indefensible view of the law, I would not lend my name or that of the Office of the Solicitor General to carrying out the order, and would certainly resign rather than carry out the order. As Mr. Waxman stated in the quotation to which this Question refers, a case may arise in which fidelity to the rule of law will require a Solicitor General to conclude that a congressional enactment cannot be defended under the Constitution (for Mr. Waxman it was the decision not to defend 18 U.S.C. § 3501(a) in *Dickerson v. United States*, which he was discussing in this passage), and a Solicitor General must have the mettle to maintain fidelity to the rule of law despite political pressure in that situation. Of course, a case may arise in which fidelity to the rule of law will require a Solicitor General to conclude that a congressional enactment should be defended, and a Solicitor General must have the mettle to maintain fidelity to the rule of law despite political pressure in that situation as well – even if it means resigning rather than carrying out an order not to defend in that situation.

With respect to the question of my own mettle, I provided the Committee with my assurance, at the hearing and again in my written testimony, that I will exercise independent judgment in fidelity to the rule of law. Beyond that, I can only say that throughout my more than 20 years in private practice and my two years of public service in the Executive Branch I have always endeavored to conduct myself with personal and professional integrity and to show the greatest fidelity to the rule of law and reverence for our Constitution. The letters submitted in support of my nomination (from former Solicitors General Fried, Starr, Days, Dellinger, Waxman, Olson, Clement and Garre, from leaders of the appellate bar who know me and my work, and from the general counsels of corporations I have represented and opposed) may provide some measure of confidence that my assurances are reliable.

99. Former Solicitor General Drew Days has written, “In my estimation, the President should think about the ways in which his intervention will be perceived by those outside the Oval Office, and how it may affect the Solicitor General’s continuing ability to serve as a credible advocate for the government, particularly in his appearances before the Supreme Court.”
- a. Do you agree or disagree with this assessment?

ANSWER

I agree.

- b. In what ways might the President's intervention in the decision-making process of the Solicitor General affect that Solicitor General's ability to serve as a credible advocate for the government?

ANSWER

If the President were to intervene in the decision-making of the Solicitor General on the basis of partisan political considerations or other illegitimate reasons, or on an indefensible view of the law, such actions could adversely affect the credibility of the Solicitor General as an advocate for the government before the Supreme Court (and other courts). In contrast – as Kenneth Starr, Seth Waxman and Paul Clement recognized in their testimony before this Committee – it is appropriate, in cases of great moment, for the Attorney General or the President to have a view respecting what the position of the United States should be. It is also appropriate for the President's legitimate legal policy objectives to be considered in formulating the litigating position of the United States (as Ted Olson explained in his testimony). But it would be imprudent, and put the credibility of the Solicitor General's Office at risk, for any President to intervene too frequently or too aggressively, even for valid legal policy reasons. As Rex Lee stated: "while I think it is proper to use the office for the purpose of making my contribution to the President's broader agenda, a wholesale departure from the role whose performance has led to the special status of the Solicitor General enjoys would unduly impair that status itself. In the process, the ability of the Solicitor General to serve any of the President's objectives would suffer." I agree with Rex Lee's views.

- c. Do you think the President's intervention could affect the credibility of the Solicitor General before the Supreme Court? Why or why not?

ANSWER

I believe my answer to Question 99b above answers this question.

- d. Given that you have indicated you will not revisit the President's decision regarding DOMA, even though your duty will require you to make an independent assessment, what effect do you believe this will have on your own credibility with other government officials?

ANSWER

As an officer of the Executive Branch, the Solicitor General exercises authority only as delegated by the Attorney General. Therefore, as I set forth more fully in response to Question 2 above, if I were confirmed as Solicitor General I would have no authority to revisit the President's decision on DOMA or any other matter. As you recognized, Senator Grassley, at Kenneth

Starr's hearing, "it is important for us to keep in mind that the holder of this post serves at the pleasure of the President of the United States." Were I to state in response to a question from this Committee that I would revisit a decision of the President or the Attorney General and make an independent assessment in defiance of their instructions, I believe that would gravely damage my credibility with other government officials. Such a statement would indicate that I do not understand the nature and source of the Solicitor General's authority, or that I would defy the rule of law by asserting authority the Solicitor General does not possess. In contrast, I believe my credibility with other government officials, including the Justices of the Supreme Court, is best preserved by describing accurately and honestly my understanding of both the vital importance of the Solicitor General's independence and the reality that the Solicitor General serves at the pleasure of the President and exercises authority delegated from and under the direction of the Attorney General – and by making clear that, while I recognize the superior authority of the Attorney General and the President, I would not lend my name or that of the Office of the Solicitor General to carrying out an order that I believed to be based on partisan political considerations or other illegitimate reasons, or an indefensible view of the law, and would certainly resign rather than carry out such an order.

- e. Given the President's decision regarding DOMA, and your apparent unwillingness to recognize your duty to revisit that decision, do you believe your credibility before the Supreme Court will be affected? Why or why not?

ANSWER

I believe my answer to Question 99d above answers this question.

100. In his opening statement at the confirmation hearings of Alberto Gonzales to be Attorney General, Senator Leahy remarked "But, you know, there are going to be times-- there may well be times when the Attorney General of the United States has to enforce the law, and he cannot be worried about friends or colleagues at the White House. His duty is to all Americans--Republicans, Democrats, Independents, all Americans." Do you agree with this sentiment? Do you think this applies to the Solicitor General as well? Please explain your answer.

ANSWER

Yes, I believe the duty of the Solicitor General is to all Americans, irrespective of partisan politics.

101. Senator Leahy went on to say "The Attorney General is about being a forceful, independent voice in our continuing quest for justice and in defense of the constitutional rights of every single American."

Do you believe the Solicitor General should be a forceful, independent voice for justice and in defense of the constitutional rights of all Americans? If so, how do you intend to accomplish this?

ANSWER

I believe the Solicitor General must always exercise independent judgment in advancing the long-term institutional interests of the United States. Those interests include respecting the constitutional rights of all Americans. If confirmed, I intend to do so by carrying out the responsibilities of the Office of Solicitor General with fidelity to the rule of law.

102. Can you provide examples of how you have been an independent voice during your government service? Are there any examples from your private practice?

ANSWER

In my more than 20 years representing clients in private practice, and in my two years of public service in the Executive Branch, it has often been my professional responsibility to explain to clients what the rule of law will permit and what the rule of law will not permit. As I am sure you can understand, the need for confidentiality is at its zenith in such situations. Clients would not feel free to ask for such advice on difficult and weighty issues if they had reason to fear that their requests, and their lawyers' responses, would be disclosed to the public. Any conversations I may have had with the President in my role as Deputy White House Counsel must remain confidential. Any conversations I may have had with the Attorney General in my role as Associate Deputy Attorney General likewise must remain confidential.

In addition, I provided the Committee with my assurance, at the hearing and again in my written testimony, that I will exercise independent judgment in fidelity to the rule of law. Beyond that, I can only say that throughout my more than 20 years in private practice and my two years of public service in the Executive Branch I have always endeavored to conduct myself with personal and professional integrity and to show the greatest fidelity to the rule of law and reverence for our Constitution. The letters submitted in support of my nomination (from former Solicitors General Fried, Starr, Days, Dellinger, Waxman, Olson, Clement and Garre, from leaders of the appellate bar who know me and my work, and from the general counsels of corporations I have represented and opposed) may provide some measure of confidence that my assurances are reliable.

103. Listed below are some of the cases in which the Department of Justice decided not to defend the underlying statute, or presented to the Court both sides of the argument. For each case, please answer the following:

- a. Briefly summarize the reason for the Department's position;
- b. Explain why you agree or disagree with that position;

- c. Identify whether or not the case falls within an exception to the duty to defend a statute that you have previously discussed with the Committee, or alternatively, whether it falls within an exception not previously discussed;
- d. Identify whether or not the case indicates that the Solicitor General was directed by the President or Attorney General to follow a particular course of action or inaction.
- (a) *Myers v. United States*, 272 U.S. 52 (1926)
  - (b) *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)
  - (c) *United States v. Lovett*, 328 U.S. 303 (1946)
  - (d) *Oregon v. Mitchell*, 400 U.S. 112 (1970)
  - (e) *Buckley v. Valeo*, 424 U.S. 1 (1976)
  - (f) *Mountain States Legal Foundation v. Watt* (consolidated with *Pacific Legal Foundation v. Watt*, 529 F. Supp. 982 (D. Mont. 1981))
  - (g) *Consumers Union v. FTC*, 691 F.2d 575 (D.C. Cir. 1982)
  - (h) *INS v. Chadha*, 462 U.S. 919 (1983)
  - (i) *Synar v. United States*, No. 83-3945, 626 F. Supp. 1374 (D.D.C. 1986).
  - (j) *Federal Defenders of San Diego, Inc., et al. v. United States Sentencing Commission*, 680 F. Supp. 26 (D.D.C. 1988)
  - (k) *Morrison v. Olson*, 487 U.S. 654 (1988)
  - (l) *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990)
  - (m) *League of Women Voters of California v. FCC*, 489 F. Supp. 517 (C.D. Cal. 1980)
  - (n) *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622 (1994)
  - (o) *Commodity Trend Service, Inc. v. CFTC*, No. 97-C-2362, 1999 WL 965962 (N.D. Ill., 1999) and *CFTC v. Blitz*, No. 98-C-6057 (N.D. Ill., 1999) (consolidated on review by *Commodity Trend Service, Inc. v. Commodity Futures Trading Commission*, 233 F.3d 981 (7th Cir. 2000))
  - (p) *Dickerson v. United States*, 530 U.S. 428 (2000)
  - (q) *Breyer v. Meissner*, 214 F.3d 416 (3rd Cir. 2000)
  - (r) *Federal Election Commission v. National Rifle Association*, 254 F.3d 173 (D.C. Cir. 2001)
  - (s) *ACLU v. Mineta*, 319 F.Supp.2d 69 (D.D.C. 2004)
  - (t) *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008)

#### ANSWER

I have reviewed the decisions listed above and other publicly available records and historical information. However, a complete description, understanding and evaluation of these matters would require examining not only the judicial decisions, but the briefs submitted as well as other relevant documents. For each of the cases, I am providing a response based on the information I have been able to obtain and review. In all cases, I have no basis to disagree with the position taken by the Executive Branch. It would not be consistent with the responsibilities and role of the Solicitor General for me to express a view about any particular decision of the Department of Justice or the President with respect to how a prior case was handled –

particularly because I played no part of the analysis and internal deliberations that preceded the decisions.

(a) *Myers v. United States*, 272 U.S. 52 (1926)

Attorney General Civiletti has thoroughly described the circumstances in *Myers*:

In *Myers v. United States*, 272 U.S. 52 (1926), the Supreme Court was asked to decide whether the President had acted lawfully in removing a postmaster from office in contravention of an Act of Congress. The Act provided that postmasters were not to be removed by the President without the advice and consent of the Senate. . . .

When the case came before the Supreme Court, the Solicitor General, appearing for the United States, assailed the attempt to limit the removal power. He argued that the statute imposed an unconstitutional burden upon the President's supervisory authority over subordinate officers in the Executive Branch. Senator Pepper made an *amicus curiae* appearance and argued that the statute was constitutional. The Court ruled that the statute was unconstitutional. More to the point, the Court ruled that the President's action in defiance of the statute had been lawful. . . . It gave rise to no actionable claim for damages under the Constitution or an Act of Congress in the Court of Claims.

. . . . *Myers* holds that the President's constitutional duty does not require him to execute unconstitutional statutes; nor does it require him to execute them provisionally, against the day that they are declared unconstitutional by the courts. He cannot be required by statute to retain postmasters against his will unless and until a court says that he may lawfully let them go. If the statute is unconstitutional, it is unconstitutional from the start.

*Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 4A Op. O.L.C. 55, 1980 WL 20999, at \*4(1980). As summarized by a subsequent OLC opinion, in *Myers*, "[t]he President refused to comply with – that is, enforce – a limitation on his power of removal that he regarded as unconstitutional, even though the question had not been addressed by the Supreme Court. A member of Congress, Senator Pepper, urged the Supreme Court to uphold the validity of the provision. The Supreme Court vindicated the President's interpretation without any member of the Court indicating that the President had acted unlawfully or inappropriately in refusing to enforce the removal restriction based on his belief that it was unconstitutional." *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199 (1994).

*Myers* is an example of the Executive both not defending and not enforcing a federal statute that unconstitutionally encroaches on Executive authority. Neither the Supreme Court's decision nor the historical record is completely clear, but this appears to be a case of the President concluding that the statute was unconstitutional, refusing to enforce it, and then having that position defended by the Solicitor General in court.

**(b) *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)**

*Humphrey's Executor* “concerned the President’s power to remove a member of the Federal Trade Commission on the grounds of policy differences, despite the existence of a for-cause removal provision in the statute establishing the Commission.” *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124 (1996). President Roosevelt defied the statute by attempting to remove a member of the FTC and the Department of Justice argued in court that the statute was unconstitutional. However, the Supreme Court “dismissed *Myers* as inapposite,” holding that the FTC was “‘an administrative body’ exercising ‘quasi-legislative or quasi-judicial powers,’ rather than an agency of the executive branch.” *Id.* As explained by the Department of Justice’s March 22, 1996 letter from Assistant Attorney General Foiss to Senator Hatch, *Humphrey's Executor*, like *Myers*, was a case in which “the President or the Department of Justice declined to enforce or implement a statute in the first instance, and the Department thereafter declined to defend the constitutionality of the statute in court.”

*Humphrey's Executor* is an example of the Executive both not defending and not enforcing a federal statute that unconstitutionally encroaches on Executive authority. Neither the Supreme Court’s decision nor the historical record is completely clear, but this appears to be a case of the President concluding that the statute was unconstitutional, refusing to enforce it, and then having that position defended by the Solicitor General in court.

**(c) *United States v. Lovett*, 328 U.S. 303 (1946)**

In *Lovett*, “the President enforced a statute that directed him to withhold compensation from three named employees, even though the President believed the law to be unconstitutional. The Justice Department argued against the constitutionality of the statute in the ensuing litigation. (The Court permitted an attorney to appear on behalf of Congress, amicus curiae, to defend the statute.)” *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199 (1994). In *Lovett*, “[t]he President directed the Attorney General not to defend the constitutionality of the provision.” *Press Briefing by Counsel to the President Jack Quinn and Assistant Attorney General Walter Dellinger* (Feb. 9, 1996).

*Lovett* is an example of the Executive enforcing but not defending the constitutionality of a federal statute based on a conclusion that the constitutionality of the statute could not be defended (and perhaps because the statute unconstitutionally encroached on Executive authority as well). Neither the Supreme Court’s decision nor the historical record is completely clear, but this appears to be an example of the President directing the position taken by the Department of Justice.

**(d) *Oregon v. Mitchell*, 400 U.S. 112 (1970)**

*Mitchell* concerned the constitutionality of a statute that lowered the voting age from 21 to 18 for state and local elections. Solicitor General Erwin Griswold “concluded that reasonable arguments could be made for the statute’s constitutionality, and he defended the voting age

provision in the Supreme Court accordingly. He began his oral argument, however, by informing the Court of the views of the President and of the Department of Justice questioning the statute's constitutionality and urged the Court to 'give consideration to these views.' In a close vote, the Court struck down the law." Seth P. Waxman, *Defending Congress*, 79 N.C. L. Rev. 1073, 1081-82 (2001).

*Mitchell* is an example of the Executive formally defending the constitutionality of a federal statute based on the conclusion that reasonable arguments could be made in defense, while publicly expressing the constitutional doubts of both the President and the Attorney General to the Supreme Court, so that the Supreme Court would receive an accurate report of the Executive's legal views.

**(e) *Buckley v. Valeo*, 424 U.S. 1 (1976)**

In *Buckley*, the "Attorney General and Solicitor General, though representing the Attorney General and FEC in defending constitutionality of most parts of the Federal Election Campaign Act of 1971, also appeared for defendant Attorney General and for the United States as amicus curiae in declaratory judgment action, arguing against the constitutionality of the appointment of FEC members by members of Congress." Letter from Assistant Attorney General Fois to Senator Hatch (March 22, 1996). Whereas, as explained by Solicitor General Seth Waxman, the brief of the Attorney General and Solicitor General in defense of the statute "elegantly put forward the best First Amendment defense of the contribution and expenditure limitations of the Federal Election Campaign Act," their amicus brief "present[ed] a different, ninety-five page discussion of the First Amendment issues in a manner that 'attempted to assist in analysis without pointing the way to particular conclusions.'" Seth P. Waxman, *Defending Congress*, 79 N.C. L. Rev. 1073, 1082-83 (2001).

*Buckley* is an example of the Executive not defending the constitutionality of a portion of federal statute based on the conclusion that the statute unconstitutionally encroaches on Executive authority, while both defending and offering "neutral" arguments about the remainder of the statute. I have discussed my views on this approach in response to Question 11 posed by Senator Sessions.

**(f) *Mountain States Legal Foundation v. Watt* (consolidated with *Pacific Legal Foundation v. Watt*, 529 F. Supp. 982 (D. Mont. 1981))**

These consolidated cases involved the actions of a House Committee, which, pursuant to a federal statute, proclaimed an "emergency situation" with regard to certain public lands and ordered those lands withdrawn from mineral leasing activity by the Secretary of Interior. The Secretary complied. Plaintiffs then sued, claiming that the Committee's actions and the underlying statute were an unconstitutional violation of separation of powers, bicameralism, presentment and delegation of legislative power. The federal defendants, represented by the Department of Justice, argued that the plaintiffs lacked standing, but that if they had standing, then the statute should be interpreted as not granting the House Committee statutory authority for its actions, or, alternatively, that the statute authorizing such actions was unconstitutional. The House Committee, the Senate, and Senator Baucus all filed *amicus curiae* briefs arguing for the

constitutionality of the statute at issue, but apparently by the time of oral argument urged the court not to reach the constitutional issue. The court held that the statute implicitly allowed the Secretary of Interior to revoke a Committee-initiated emergency withdrawal (via the Secretary's power to determine the scope and duration of any withdrawal), thus not requiring the court to reach the constitutional questions. However, the court also noted that if the statute were not interpreted to allow the Secretary such discretion, it would be unconstitutional.

*Mountain States Legal Foundation* is an example of the Executive enforcing but not defending the constitutionality of a federal statute that unconstitutionally encroaches on Executive authority, although the Executive also urged the court not to reach the constitutional question by interpreting the statute at issue in a manner that did not unduly diminish Executive power. As far as I am aware, the case and the historical record are not clear as to the interaction, if any, among the President, the Attorney General and the Solicitor General regarding the litigating position of the United States.

**(g) *Consumers Union v. FTC*, 691 F.2d 575 (D.C. Cir. 1982)**

*Consumers Union* involved a federal statute providing for a legislative veto by requiring the Federal Trade Commission, "after promulgating any final rule, to submit such rule to Congress for review. The rule becomes effective after ninety days of continuous session following submission unless both Houses of Congress adopt a concurrent resolution disapproving the final rule." 691 F.2d at 576. Consumer groups challenged the statute after Congress vetoed a rule promulgated by the FTC to protect used car customers; the FTC did not attempt to implement the rule after the veto. The "House and Senate, as named defendants, . . . vigorously aired their position on the constitutionality of the congressional veto," *id.* at 577, whereas the FTC, represented by the Department of Justice, apparently agreed with the plaintiffs that the veto was unconstitutional. The D.C. Circuit ruled that the statute and congressional action were unconstitutional (under separation of powers and presentment), relying on the reasoning of the recent D.C. Circuit decision in *Consumers Energy Council v. FERC* that struck down the legislative veto.

*Consumers Union* is an example of the Executive enforcing but not defending the constitutionality of a federal statute that unconstitutionally encroaches on Executive authority. As far as I am aware, the case and the historical record are not clear as to the interaction, if any, among the President, the Attorney General and the Solicitor General regarding the litigating position of the United States.

**(h) *INS v. Chadha*, 462 U.S. 919 (1983)**

*Chadha* "involved the withholding of citizenship from an applicant pursuant to a legislative veto of an Attorney General decision to grant citizenship. Despite a Carter Administration policy against complying with legislative vetoes . . . , the executive branch enforced the legislative veto, and, in so doing, allowed for judicial review of the statute. As with *Lovett*, the Justice Department argued against the constitutionality of the statute." *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199 (1994). As the Supreme Court recognized in *Chadha*, "[w]e have long held that Congress is the proper party to

defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional.” *Chadha*, 462 U.S. at 940.

*Chadha* is an example of the Executive enforcing but not defending the constitutionality of a federal statute that unconstitutionally encroaches on Executive authority. As far as I am aware, the case and the historical record are not clear as to the interaction, if any, among the President, the Attorney General and the Solicitor General regarding the litigating position of the United States.

**(i) *Synar v. United States*, No. 83-3945, 626 F. Supp. 1374 (D.D.C. 1986)**

In *Synar*, the “Department of Justice appeared on behalf of defendant United States in [a] declaratory judgment action to argue against the constitutionality of [the] Gramm-Rudman-Hollings provision that gave [the] Comptroller General a role in exercising executive functions under the Act.” Letter from Assistant Attorney General Fois to Senator Hatch (March 22, 1996). By letter dated December 30, 1985, Attorney General Meese had informed Congress that, although the Department of Justice would continue to argue that the plaintiffs lacked standing to sue in *Synar*, in the event the court found standing, the Department would take the position that the provisions concerning the role of the Comptroller General and the Director of the Congressional Budget Office were unconstitutional. In so informing Congress, Attorney General Meese cited a November 21, 1984 letter from Attorney General Smith to Congress, in which the Department of Justice had previously alerted Congress (in the context of different but related legislation) that it viewed the Comptroller General’s role as violating the separation of powers to the extent that the Comptroller General was performing duties other than those of a legislative officer. In that earlier letter, the Attorney General informed Congress that it would neither defend the constitutionality of nor enforce the provisions regarding the Comptroller General.

*Synar* is an example of the Executive not defending the constitutionality of a federal statute that unconstitutionally encroaches on Executive authority. Although the record indicates that the Executive did not enforce at least some statutory provisions implicating the Comptroller General, it is not clear whether the provisions in *Synar* were executed prior to judicial resolution. As far as I am aware, the case and the historical record are not clear as to the interaction, if any, among the President, the Attorney General and the Solicitor General regarding the litigating position of the United States.

**(j) *Federal Defenders of San Diego, Inc., et al. v. United States Sentencing Commission*, 680 F. Supp. 26 (D.D.C. 1988)**

In *Federal Defenders*, groups of federal public defenders challenged the constitutionality of the Federal Sentencing Guidelines. The Department of Justice moved to dismiss the plaintiffs’ challenge, arguing that the plaintiffs lacked standing and that the Guidelines and Sentencing Commission were constitutional. The district court held that the plaintiffs lacked standing to bring such a challenge. On January 27, 1988, Attorney General Meese notified Congress that the Department of Justice intended to defend the Guidelines and the Sentencing Commission, but based on an argument that the Commission was exercising Executive power

and was not located in the “judicial branch,” as the Sentencing Reform Act stated. The Guidelines were ultimately upheld in *Mistretta v. United States*, 488 U.S. 361 (1989), in which the Department of Justice, representing the United States, argued for their constitutionality. The Department’s Supreme Court brief in *Mistretta* argued that despite words in the Sentencing Reform Act purporting to locate the Sentencing Commission in the “judicial branch,” the Commission was actually an independent commission within the Executive Branch and therefore constitutional. The Department’s brief appeared to tacitly acknowledge that if the words “judicial branch” were given constitutional significance, then the statute would be unconstitutional (presumably as a violation of the separation of powers), but it therefore urged severance of the phrase in order to avoid invalidation of the Act.

As far as I am aware, the case and the historical record are not clear as to the interaction, if any, among the President, the Attorney General and the Solicitor General regarding the litigating position of the United States.

**(k) *Morrison v. Olson*, 487 U.S. 654 (1988)**

In *Morrison*, the “President viewed the independent counsel statute as unconstitutional. The Attorney General enforced it, making findings and forwarding them to the Special Division. In litigation, however, the Justice Department attacked the constitutionality of the statute and left its defense to the Senate Counsel, as *amicus curiae*, and the independent counsel herself.” *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199 (1994). The Supreme Court upheld the statute.

*Morrison* is an example of the Executive enforcing but not defending the constitutionality of a federal statute that unconstitutionally encroaches on Executive authority. As far as I am aware, the case and the historical record are not clear as to the interaction, if any, among the President, the Attorney General and the Solicitor General regarding the litigating position of the United States.

**(l) *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990)**

*Metro Broadcasting* concerned the Federal Communication Commission’s “policy of awarding preferences in licensing to broadcast stations with a certain level of minority ownership or participation,” and an appropriations statute prohibited the FCC from changing this policy. Letter from Assistant Attorney General Fois to Senator Hatch (March 22, 1996). The FCC complied with the statute barring a policy change, but “the Acting Solicitor General, appearing on behalf of the United States as *amicus curiae*, argued that, insofar as the statute required the FCC to continue its preference policy, it worked an unconstitutional denial of equal protection.” *Id.* The Acting Solicitor General authorized the FCC to appear before the Court through its own attorneys “in order for the Court to have the benefit of the views of the administrative agency involved,” (citing brief for the United States) and the FCC defended the constitutionality of the statute and the FCC policy. *Id.* The “Senate Legal Counsel also appeared on behalf of the Senate as *amicus curiae* to defend the constitutionality of the statute.” *Id.* The Court upheld the statutorily mandated FCC policy.

*Metro Broadcasting* is an example of the Executive enforcing but not defending the constitutionality of a federal statute based on a conclusion that the constitutionality of the statute could not be defended. Although the historical record is not entirely clear, this appears to be a case in which the Department of Justice concluded that there were no reasonable arguments that could be offered in defense of the statute that required the FCC to maintain its minority preference policy. As far as I am aware, the case and the historical record are not clear as to the interaction, if any, among the President, the Attorney General and the Solicitor General regarding the litigating position of the United States.

**(m) *League of Women Voters of California v. FCC*, 489 F. Supp. 517 (C.D. Cal. 1980)**

*League of Women Voters* concerned a statutory provision that barred noncommercial television stations from endorsing or opposing political candidates. “The Attorney General concluded that this prohibition violated the First Amendment and that reasonable arguments could not be advanced to defend the statute against constitutional challenge.” Letter from Assistant Attorney General Fois to Senator Hatch (March 22, 1996). The FCC stated that it would enforce the statute but “would not defend the statute’s constitutionality.” *Id.* “Senate Legal Counsel appeared in the case on behalf of the Senate as *amicus curiae*.” *Id.* The trial court dismissed the case as unripe, and, “[w]hile appeal of that decision was pending, a successor Attorney General reconsidered the Department’s previous position and decided that the Department could defend the statute’s constitutionality.” *Id.* The Supreme Court eventually struck down the statute. *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984).

*League of Women Voters* is an example of the Executive enforcing but not defending the constitutionality of a federal statute. This appears to be a case in which the Department of Justice concluded that no reasonable arguments could be made in defense of the statute. As far as I am aware, the case and the historical record are not clear as to the interaction, if any, among the President, the Attorney General and the Acting Solicitor General regarding the litigating position of the United States.

**(n) *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622 (1994)**

*Turner* concerned the “must carry” provisions of the 1992 Cable Act, which required cable operators to carry certain channels. “The Act was enacted over President Bush’s veto. In his veto message, the President stated that one of the reasons for his veto was that the must-carry provisions were unconstitutional.” Letter from Assistant Attorney General Fois to Senator Hatch (March 22, 1996). The FCC took steps to comply with the 1992 Act, but “the Department of Justice, appearing on behalf of defendant FCC, informed the district court that it declined to defend the constitutionality of the must-carry provisions, ‘consistent with President Bush’s veto message to Congress.’” *Id.* In a letter sent on November 4, 1992 from Assistant Attorney General Stuart Gerson, the Department of Justice notified Congress that “because President Bush had determined that the ‘must-carry’ provisions of the [Act] were unconstitutional, the Department of Justice could not defend the constitutionality of those provisions in court.” *Id.* Assistant Attorney General Gerson’s letter stated that the “department would not substantively and could not ethically take a different position at this time” from that of the President, in light of

the legal advice that the Justice Department had provided President Bush and the President's veto of the bill. Letter from Assistant Attorney General Gerson to President of the Senate Dan Quayle (Nov. 4, 1992). As that letter stated: "[T]he President is the ultimate client of the Department of Justice in all litigation involving the Executive Branch . . . In light of the strong position taken by the President on must-carry in reliance on our analysis, an ethical conflict of interest would be created were the department now to defend these actions of the statute." *Id.* The subsequent Administration reconsidered the position of the previous Administration "and decided that the Department should defend the constitutionality of the must-carry provisions," Letter from Assistant Attorney General Fois to Senator Hatch (March 22, 1996), which were eventually upheld by the Supreme Court.

*Turner* is an example of the Executive enforcing but not defending the constitutionality of a federal statute. According to the available documents, this appears to be a case in which the Department concluded that it could not reasonably defend the constitutionality of the provisions at issue, particularly in light of the decision that the law was unconstitutional.

(o) ***Commodity Trend Service, Inc. v. CFTC*, No. 97-C-2362, 1999 WL 965962 (N.D. Ill., 1999) and *CFTC v. Blitz*, No. 98-C-6057 (N.D. Ill., 1999) (consolidated on review by *Commodity Trend Service, Inc. v. Commodity Futures Trading Commission*, 233 F.3d 981 (7th Cir. 2000))**

These cases involved, among other things, a First Amendment challenge to an anti-fraud provision of the Commodities Exchange Act that required plaintiffs to register as a commodity trading adviser. The plaintiffs argued that the registration requirement was overbroad and thus failed First Amendment scrutiny, a claim on which they prevailed against the Commodity Futures Trading Commission in the district court. "The CFTC originally appealed the district court's decision that the registration requirements . . . are unconstitutional as applied to [plaintiff], but voluntarily dismissed that appeal," as the "CFTC ha[d] recently adopted a rule exempting from registration CTAs that do not direct client accounts and provide only impersonal trading advice." 233 F.3d at 985 n.1. The CFTC continued to pursue other issues in the case on appeal. By letter dated March 6, 2000, Solicitor General Waxman informed Congress that the CFTC would not be appealing the adverse district court ruling on the First Amendment claim, "based on unusual factors affecting only this case and a few similar cases," and noting that the decision not to appeal did "not reflect a determination on the part of the Executive Branch that the statute in question is unconstitutional." As the Solicitor General explained, the "unusual circumstances" entailed "the Commission's adoption of a new exemption, and its reasonable determination not to continue litigating the constitutional issue in light of the availability of that exemption."

Thus, *Commodity Trend Service* is a case in which the federal defendant defended the constitutionality of a statute in the lower court, and then decided not to pursue an appeal of an adverse First Amendment ruling in light of a material regulatory change that removed the constitutional issues going forward. Strictly speaking, it does not involve a decision not to defend a statute based on the conclusion that it violates the separation of powers or that no reasonable arguments can be made in its defense. As far as I am aware, the case and the

historical record are not clear as to the interaction, if any, among the President, the Attorney General and the Solicitor General regarding the litigating position of the United States.

**(p) *Dickerson v. United States*, 530 U.S. 428 (2000)**

*Dickerson* concerned the constitutionality of a federal statute that sought to overrule the Supreme Court's decision in *Miranda*. As explained by Solicitor General Seth Waxman: "as we saw it, the Supreme Court's repeated, consistent application of *Miranda* to the States could only mean that the doctrine is a constitutional one; and because the statute in question could not be reconciled with *Miranda*, it could constitutionally be applied only if the Court were to overrule *Miranda* and the dozens of cases that have followed, applied, and extended the landmark decision. Taking into account all of the factors informing the doctrine of stare decisis, and all of the interests of the United States, neither the Attorney General nor I could conclude that *Miranda* should be overruled. We discussed our conclusion with the President, and he agreed." Seth P. Waxman, *Defending Congress*, 79 N.C. L. Rev. 1073, 1087-88 (2001).

*Dickerson* is an example of the Executive not defending the constitutionality of a federal statute based on the conclusion that no reasonable arguments could be advanced to defend the statute unless the Department of Justice were to ask the Supreme Court to overrule binding precedent, a step the Department concluded it could not take consistent with the standard the Department traditionally applies. The historical record that I have examined indicates that the Solicitor General and Attorney General jointly reached that decision, and then shared it with the President, who concurred.

**(q) *Breyer v. Meissner*, 214 F.3d 416 (3rd Cir. 2000)**

In *Breyer*, a Nazi war criminal sought to prevent his denaturalization and deportation by claiming that he should be deemed an American citizen by birth – a claim that failed under certain provisions of federal immigration statutes. Under those provisions, "all children born abroad in 1934 or later to an American mother or father were entitled to American citizenship at birth; by contrast, children born abroad before 1934 were entitled to citizenship only if their fathers were American." 214 F.3d at 422. Because Breyer was born abroad before 1934 and only his mother was American, the INS denied his claim to citizenship. The Justice Department defended the constitutionality of the provisions at issue in the district court and the Third Circuit, which reversed the district court and struck down the provisions as violating equal protection by discriminating against Breyer's mother on the basis of sex. However, the Third Circuit also remanded to the district court for further proceedings to determine whether Breyer's actions had amounted to a voluntary renunciation of his citizenship. Accordingly, as indicated by Solicitor General Waxman's August 25, 2000 letter to Congress, the Department decided not to seek certiorari "[i]n light of the current interlocutory posture of the case."

*Breyer* is an example of the Executive enforcing and defending the constitutionality of a federal statute. The Department did not seek certiorari from the Third Circuit's interlocutory decision for strategic reasons, but it did continue to pursue the case against the plaintiff's claim to citizenship. As far as I am aware, the decision and the historical record are not clear as to the

interaction, if any, among the President, the Attorney General and the Solicitor General regarding the litigating position of the United States.

**(r) *Federal Election Commission v. National Rifle Association*, 254 F.3d 173 (D.C. Cir. 2001)**

*FEC v. NRA* involved a Federal Election Commission enforcement action against the National Rifle Association based on allegations that the NRA, in three separate election cycles, violated campaign finance laws prohibiting corporate contributions to federal elections. The D.C. Circuit determined that the laws could be constitutionally applied to the NRA with respect to two election cycles in which the NRA received substantial contributions from for-profit corporations, but that the laws could not be constitutionally applied to the NRA for the remaining election cycle, in which the corporate contributions received by the NRA were de minimis. FEC attorneys litigated the case, which did not involve attorneys from the Justice Department. It appears that the FEC did not seek certiorari from the portion of the D.C. Circuit's ruling that the campaign finance laws could not constitutionally be applied to the NRA's activities for one of the three election cycles at issue.

*FEC v. NRA* is an example of an independent agency enforcing and defending the constitutionality of a federal statute. The FEC largely prevailed before the D.C. Circuit but did not seek certiorari from one aspect of the D.C. Circuit's ruling for a variety of strategic reasons, elaborated in Solicitor General Olson's December 21, 2001 letter to Congress. As far as I am aware, the historical record is not clear as to the interaction, if any, among the President, the Attorney General and the Solicitor General regarding the litigating position of the United States.

**(s) *ACLU v. Mineta*, 319 F. Supp. 2d 69 (D.D.C. 2004)**

*ACLU v. Mineta* involved the constitutionality of a federal statute that denied federal funding to public transit authorities that were involved in any activity promoting the legalization of marijuana, pursuant to which a public transit authority denied advertising space to an organization promoting reform of the marijuana laws. The district court held that the statute constituted viewpoint discrimination in violation of the First Amendment and enjoined its enforcement. Although the Justice Department defended the constitutionality of the statute in the district court, on December 23, 2004, it notified Congress pursuant to 28 U.S.C. § 530D that it would not appeal the district court's ruling. Acting Solicitor General Clement explained to Congress that the district court had struck down the statute under "well established Supreme Court precedent" concerning viewpoint discrimination under the First Amendment, and thus concluded that "the government does not have a viable argument to advance in the statute's defense and will not appeal the district court's decision." General Clement explained that the law arguably could be defended if public transit authorities implemented the law by barring a wider swath of speech in a viewpoint-neutral manner, but that such a position would not appear to be consistent with congressional intent. Before notifying Congress, the Department had filed a protective notice of appeal in the D.C. Circuit; its letter to Congress was dated approximately one month before the deadline for filing the brief of the United States. Congress did not choose to participate in the appeal.

*ACLU v. Mineta* is a case in which the Department defended the constitutionality of a federal statute in a district court, and then decided not to pursue an appeal of an adverse First Amendment ruling in light of the lack of a “viable” argument to advance in the statute’s defense. However, as the Department had made non-frivolous arguments in defense of the statute in the district court, it appears that the Department could have proceeded with the appeal by making non-frivolous but non-“viable” arguments. As far as I am aware, the historical record is not clear as to the interaction, if any, among the President, the Attorney General and the Solicitor General regarding the litigating position of the United States.

**(t) *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008)**

*Witt* involved an as-applied challenge to the Air Force’s “don’t ask, don’t tell” policy. Like *Breyer v. Meissner*, discussed above, the Executive both enforced and defended the statute, and the Department of Justice declined to seek certiorari from an adverse court of appeals ruling at the motion to dismiss stage, for litigation strategy reasons. I have explained my observations on this matter, including the decision by the Department not to seek certiorari from the Ninth Circuit’s interlocutory ruling, in my response to Question 13 of Senator Sessions. The case does not reflect, and I did not play any part in and do not have any other knowledge of, any interactions among the President, the Attorney General and the Solicitor General regarding the litigating position of the United States.

104. Do you feel you have been treated fairly in the confirmation process?

ANSWER

I was treated with great courtesy at my confirmation hearing, and at the several individual meetings with members of this Committee. The advice and consent power of Article II, Section 2 of the Constitution is a weighty responsibility, to be exercised by members of this Committee as they think best on the basis of information they believe they need, and I would not presume to offer any opinion about the way in which the Members of this Committee have carried out this responsibility.

105. Would you like the opportunity to return before the Committee to clarify, expand or correct any of the answers you have previously provided?

ANSWER

I believe that the hearing, my visits with individual Senators, and my responses to the questions for the record have provided me with the opportunity to present my views fully.

106. Please describe your experience during the post-nomination process, from your date of nomination to the hearing. Include strategy meetings, moot or other preparatory sessions, meetings with DOJ or White House officials, and courtesy visits with Senators.

ANSWER

I had various meetings with members of the White House staff and Department of Justice officials to prepare for the hearings. I had courtesy visits with the following members of the Committee: Ranking Member Grassley, Senator Graham, Senator Lee, Senator Kohl, Senator Whitehouse, Senator Klobuchar, Senator Franken, and Senator Blumenthal.

107. Please describe with particularity the process by which these questions were answered, including preparation of responses, review of responses, suggested revisions, and submission of final responses.

ANSWER

I reviewed the questions and prepared a first draft of a response to each. I asked several people to review the draft answers and make editorial suggestions. I received those editorial suggestions, and made some revisions to the responses in light of the suggestions I received. I also revised the responses several times myself.

108. Do these answers reflect your true and personal views?

ANSWER

Yes.

Questions for Donald Verrilli from Senator Orrin Hatch

1. During your hearing on March 30, you said that you will apply “the same standard that Solicitors General have applied” and that “there are only two exceptions” to the obligation to defend the constitutionality of statutes. These are if a statute “violates the separation of powers” or “if there is no reasonable argument that can be advanced in defense of the statute.” You said that these are “the two and only two exceptions” to that duty. But later you told me that you would defend the constitutionality of a statute “unless instructed by my superiors not to do so.” If a statute does not violate the separation of powers, and reasonable arguments can be made to defend its constitutionality, would you decline to defend it if your superiors told you not to do so?

ANSWER

I appreciate the opportunity to clarify my position on this question. What I meant to convey was that if I were instructed by my superiors not to defend a statute, I could not defy that instruction and proceed with the defense of the statute. The Solicitor General lacks any such authority. As Charles Fried testified during his confirmation hearing (and as I address more fully in response to Question 5 below), “[t]he statutes and regulations which set out the Office of the Solicitor General plainly indicate that the Solicitor General is a subordinate official of the Attorney General” and that the Attorney General “has the clear statutory authority to direct the Solicitor General to take a contrary position” to the position the Solicitor General would take in the exercise of his or her own independent judgment. Disregarding such a command would be insubordination and would itself violate the rule of law.

But I did not mean to suggest that I would carry out an order despite my conviction that doing so was wrong. If I, as Solicitor General, decided to defend an act of Congress, and the Attorney General or the President overruled that decision and ordered that the statute not be defended, based on what I believed to be political considerations or other illegitimate reasons, or an indefensible view of the law, I would not lend my name or that of the Office of the Solicitor General to carrying out the order, and would certainly resign rather than carry out the order.

2. Your position that you would not defend the constitutionality of statutes when instructed not to do so appears to create a third exception to the Solicitor General’s duty. Are you aware of any previous Solicitor General taking this position regarding the general duty of the office, either as a nominee or while in office?

ANSWER

I believe there are two exceptions. First, the Department of Justice will decline to defend a statute when it violates the separation of powers by infringing on the President's constitutional authority. Second, the Department of Justice will not defend a statute when there are no reasonable arguments that can be offered in its defense.

Although some have suggested that there is a third exception consisting of cases in which the President has publicly declared that a law is unconstitutional, I do not view it that way. Discussion of situations in which the President has made such an announcement are addressing a different issue: whether the Solicitor General or a superior officer (the Attorney General or the President) has the final say in determining what position the United States will take in court. As I explain in detail in my response to Question 5 below, the Attorney General (and the President, as the Attorney General's superior) possess the ultimate legal authority to overrule the Solicitor General. Thus, if I am confirmed as Solicitor General, I could not proceed with the defense of a statute in defiance of an order from the Attorney General or the President not to do so.

That does not mean I would carry out an order despite my conviction that doing so would be wrong. If I, as Solicitor General, decided to defend an act of Congress, and the Attorney General or the President overruled that decision and ordered that the statute not be defended, based on what I believed to be partisan political considerations or other illegitimate reasons, or an indefensible view of the law, I would not lend my name or that of the Office of the Solicitor General to carrying out the order, and would certainly resign rather than carry out the order.

I believe my view is the same as that of other Solicitor General nominees. For example, Paul Clement stated, in written testimony, that "the Attorney General and the President . . . certainly have the power to overrule the Solicitor General." He also stated that: "In those rare matters of such sufficient moment to come to the attention of the Attorney General, if the Attorney General reaches a different conclusion [from the Solicitor General], the most important thing is for the Solicitor General to have an opportunity to discuss the matter in an effort to reach agreement. In the event agreement cannot be reached, the Attorney General and ultimately the President have the final call." He went on to say that "[o]f course, the President ultimately has the right under the Constitution to have his Solicitor General file the brief he wants filed. At the same time, he does not have the right to insist that I file any particular brief. I can certainly imagine situations in which I would resign before filing a brief that I thought outside the bounds of proper advocacy, and I can imagine other situations in which the handling of a series of briefs would lead me to resign." Similarly, Kenneth Starr, in his written testimony to this Committee, recognized that "the Attorney General retains responsibility for and ultimate direction of the Government's arguments before the courts." He then went on to say: "[i]f I were being asked [by the Attorney General or the President] to take what I thought was a legally indefensible position, I would not sign the brief or make that argument." Charles Fried – after recognizing

that the Attorney General has “clear statutory authority” to overrule the Solicitor General – made clear that he would resign if a case should arise “in which the Attorney General should direct the Solicitor General to take a position which is not simply one with which he does not agree, but which he feels is influenced by improper factors, or, cannot conscientiously be urged to the Court.”

I agree with their statements.

3. In your hearing, I asked whether it is the Solicitor General’s duty “actually to defend...if a reasonable argument exists, or to give advice on that argument, or that question?” You responded that “the long-standing tradition of the Department of Justice is to defend statutes as long as there is a reasonable argument to be made in their defense.” Senator Grassley asked what you would do if you thought a reasonable argument could be made to defend a statute but the Attorney General “concluded that a statute should not be defended.” You said that you would only “give my best advice.” These descriptions of the Solicitor General’s duty appear to conflict. Let me ask you again. Is the Solicitor General’s duty actually to defend a statute if reasonable arguments can be made or to give advice on that question?

ANSWER

The Solicitor General’s responsibility and duty is not merely to give advice. The Solicitor General’s responsibility is to defend the constitutionality of a statute when there are reasonable arguments that can be made in its defense and when the statute does not violate the separation of powers. In my testimony, I was trying to make the same point Paul Clement made when he was before this Committee:

In those rare matters of such sufficient moment to come to the attention of the Attorney General, if the Attorney General reaches a different conclusion [from the Solicitor General], the most important thing is for the Solicitor General to have an opportunity to discuss the matter in an effort to reach agreement. In the event agreement cannot be reached, the Attorney General and ultimately the President have the final call. Of course, the President ultimately has the right under the Constitution to have his Solicitor General file the brief he wants filed. At the same time, he does not have the right to insist that I file any particular brief. I can certainly imagine situations in which I would resign before filing a brief that I thought outside the bounds of proper advocacy, and I can imagine other situations in which the handling of a series of briefs would lead me to resign.

Elena Kagan expressed the same point in her written testimony in connection with her Solicitor General confirmation hearing:

If I am confirmed and I disagree with the President on the position to take in a case for which the Solicitor General's office is responsible, I would do my best to persuade him of the correctness of the office's views or the appropriateness of deferring to the office. (I believe that if the disagreement were with the Attorney General, a natural step would be to appeal to the President.) If the disagreement were to continue, I would consider the nature of the case, the nature of the disagreement, and the full range of ways to deal with the disagreement. I should clarify here that the critical question is not what would happen if I "personally" disagree with the President, because my personal views would be irrelevant; the critical question is what would happen if the President and I were to disagree on the position that will advance the long-term interests of the United States, which is the Solicitor General's client. That is the only basis on which I would act as Solicitor General, and so that is the only ground on which disagreement between myself and the President might present itself. If I believe this disagreement goes to a highly material matter – a matter, for example, that would involve me in failing to fulfill my essential obligations to the Court or Congress, I would have to resign my office. Needless to say, I do not foresee any significant likelihood that this will happen. But I believe the Solicitor General needs to be able to walk away from the job when her assessment of her role and the obligations attendant on that role differs significantly from those of the President.

I share the views expressed by Paul Clement and Justice Kagan. I believe that the job of the Solicitor General is to determine the litigation position that best furthers the long-term institutional interests of the United States. If I am confirmed, I will do so based on my best judgment of what the law requires – and I agree with Ted Olson's testimony that "a partisan interest from the standpoint of partisan politics" must play absolutely no role. As other Solicitors General have done, I will keep the Attorney General and the President informed of these decisions – in recognition, as I have mentioned above and will address more fully in the response to Question 5 below, that they possess the ultimate authority to direct the Solicitor General to take a different position. But I expect that the Attorney General and the President will rarely, if ever, direct the Solicitor General to take a position contrary to his or her best professional judgment, in recognition of the important values served by respecting the unique role of the Solicitor General (described more fully in the response to Question 5 below). If the Attorney General does become engaged, then it will be critically important for me to give my best advice – which may be, depending on the circumstances, advice that the position the Attorney General wants to take cannot be supported under the law (in other words, to just say "no") and may include a statement that, as Solicitor General, I cannot carry out an instruction not to defend. Of course, as Paul Clement and many other Solicitor General nominees have recognized, the Attorney General and the President have the final call in determining the position adopted in the brief filed on behalf of the United States. But they do not have the right to have me carry out an

order I believe is wrong. So if my advice did not carry the day, and I was instructed to carry out an order I believed was wrong, I would not carry out the order. I would not lend my name or that of the Office of Solicitor General to carrying out such an order, and would resign rather than do so.

4. In his confirmation hearing on April 5, 2001, Solicitor General nominee Ted Olson was asked by Senator Feingold what he would do if the President had “grave reservations about the constitutionality of certain [statutory] provisions. What in that situation is your view of the responsibility of the Solicitor General when those provisions are challenged?” Mr. Olson replied that the President’s view “doesn’t alleviate the Justice Department from its responsibility to do everything it can within reason to defend the constitutionality of the statute.” During your hearing, however, you said that you would “apply the traditional Justice Department standards...to the extent it has not already been decided by the President and the Attorney General.” You told me that “the question really would be whether the Attorney General or the President are satisfied that those standards are met” with regard to defending the constitutionality of statutes.
- These views appear to conflict. If you believe otherwise, please explain how they are in harmony.
  - Mr. Olson appeared to say that the Solicitor General’s duty is independent of the President’s view, while you appeared to say that it is contingent upon the President’s view. Please explain this apparent conflict.
  - Is it your view that the Solicitor General’s duty to defend the constitutionality of statutes exists only when the President or Attorney General have not already made a decision on that question?

ANSWER

I agree with Ted Olson’s views. In my testimony, I was trying to address a different issue.

Ted Olson stated his view about how the Solicitor General should proceed in a situation in which the President has expressed doubts about the constitutionality of a statute. He said that the fact that a President had doubts, or even grave reservations, about the constitutionality of a statute would not alleviate the Solicitor General of his or her responsibility to apply the traditional standards in deciding whether the statute will be defended in court, including the strong presumption of constitutionality to which all congressional enactments are entitled. Paul Clement made a similar point in his testimony, noting that the “basic analysis . . . would really be no different” but also noting that “whatever prompted the President’s grave doubts would probably be part of our analysis,” and that “I can imagine a situation where the doubts are so

grave that we ultimately decide that a reasonable argument can't be made in defense of the statute." I hold the same views.

In my testimony, I attempted to address a different situation – one in which the President or the Attorney General has not merely expressed doubts, even grave doubts, about the constitutionality of a statute, but has actually issued an instruction not to defend the statute. Once the President or the Attorney General has issued such an instruction, the decision is no longer the Solicitor General's to make, and the Solicitor General cannot defy the instruction and continue to defend the statute. In that situation, the Solicitor General faces a different choice. If I were confirmed, I would not carry out an order if I believed it was wrong (as I explain in more detail in response to Question I above). I would not lend my name or that of the Office of Solicitor General to carrying out the order, and would resign rather than do so.

5. In your hearing, Senator Grassley asked what you would do if the President believed that a statute should not be defended. You said you would give your "best advice" but that since "the Solicitor General is exercising authority that is given by statute to the Attorney General...it is the Attorney General's authority." You later told me that "the Solicitor General is exercising the Attorney General's authority."
  - What is the basis or source for this theory of derivative authority?
  - Are you aware of any other Solicitor General nominee who has argued that the Solicitor General is merely exercising derivative authority?

ANSWER

I appreciate the opportunity to address this question, which touches on the vital importance of the independent judgment a Solicitor General must exercise to discharge the responsibilities of the Office, and on the relationship between the Solicitor General and the Attorney General.

By long tradition, the Solicitor General has been afforded a great measure of independence in carrying out the functions of the office, in recognition that the exercise of that independent legal judgment in the long run best serves the interests of the Executive Branch, as well as the Congress and the Supreme Court. The question of exactly what the Solicitor General's independence consists of is one on which many former Solicitors General, lawyers in the Office of the Solicitor General, and scholars have expressed a variety of opinions. For me, it means the following: The Solicitor General decides what the position of the United States will be in litigation within the Solicitor General's purview based on the law and on the Solicitor General's best judgment of what is in the long-term institutional interests of the United States – partisan considerations play absolutely no role in the Solicitor General's judgments. That is true for all

decisions a Solicitor General makes, and is certainly true for judgments about whether reasonable arguments exist to defend an act of Congress.

Attorneys General and Presidents have come to appreciate the importance of affording the Solicitor General the ability to make independent judgments based on the law and the long-term institutional interests of the United States. This exercise of independent judgment allows the Solicitor General's Office – in the words of Rex Lee, one of the finest Solicitors General – to “provide the Court from one administration to another – and largely without regard to either the political party or the personality of the particular Solicitor General – with advocacy which is more objective, more competent, and more respectful of the Court as an institution than it gets from any other group of lawyers.” Independence thus allows the Solicitor General to fulfill his or her responsibilities as an officer of the Supreme Court. At the same time, the reservoir of credibility that such advocacy builds up will serve the interests of any President and any administration in achieving its overall objectives, even if an administration must forgo taking a position that might advance a particular administration objective in a particular case. This independence also fosters respect for Congress as a co-equal branch of government. Finally, it will always benefit the Attorney General and the President to receive the independent and expert legal judgment of the Solicitor General to mark the boundaries of what the law will allow, and ensure that an administration's legal policy objectives are achieved in fidelity to the rule of law.

As critically important as this independence is to the proper functioning of the Office of the Solicitor General, the Solicitor General does not exercise independence in the sense of having the legal authority to make the final call on the positions the United States will take in court. In the overwhelming majority of instances, the Solicitor General does make the final call because the Attorney General and the President respect the Solicitor General's independent judgment and do not seek to intervene. But the Attorney General (and the President, as the Attorney General's superior) do have the legal authority to overrule the Solicitor General's independent judgment about what the litigation position of the United States should be. *See* 1 Op. O.L.C. 228, 230 (1977) (“Under the relevant statutes . . . the Attorney General retains the right to assume the Solicitor General's function himself.”) As Charles Fried recognized in his testimony before this Committee, “there will be occasions – there always have been and there will continue to be – on which the Attorney General, in rare cases, concludes that the judgment his Solicitor General has given him is a judgment with which he does not concur, and in that event he has the clear statutory authority to direct the Solicitor General to take a contrary position.”

Throughout our nation's history, Congress has vested in the Attorney General the power to control what position the United States will take in court. The Judiciary Act of 1789, which created the office of Attorney General, provided that: “there shall . . . be appointed a . . . person, learned in the law, to act as attorney-general for the United States, . . . *whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be*

*concerned* and to give his advice and opinion upon questions of law when required by the President of the United States or when requested by the heads of any of the departments, touching any matters that may concern their departments.” Act of Sept. 24, 1789, ch. 20 § 35, 1 Stat. 73, 93 (emphasis added). Subsequent Judiciary Acts have expanded and refined the scope of the Attorney General’s authority, but that authority has always included control over the position the United States takes in litigation.

For nearly a century after Congress created the office, the Attorney General remained directly responsible for representing the United States in court. Indeed, the office of Solicitor General did not exist. As the nation grew and the functions of the Attorney General expanded, it became impossible for the Attorney General to carry out all of his congressionally assigned functions personally, and the Attorney General therefore often retained private counsel to represent the United States before the Supreme Court and in the lower federal courts – with the result that private counsel were making their own independent, and often inconsistent, judgments regarding what the position of the United States should be in any given case. *See generally* Seth P. Waxman, *Presenting the Case of the United States As It Should Be: The Solicitor General in Historical Context*, 1998 *Journal of Supreme Court History* 3.

To alleviate the burden on the Attorney General, to provide for consistency and uniformity in the positions the United States advanced before the Supreme Court and the lower federal courts, and to save the expense of retaining private counsel, *see* Waxman *supra*, Congress created the position of Solicitor General in the Judiciary Act of 1870, which also established the Department of Justice. That enactment provided: “that there shall be in said Department [of Justice] an officer learned in the law, *to assist the Attorney-General in the performance of his duties*, to be called the solicitor-general . . . .” Act of June 22, 1870, ch. CL, § 2, 16 Stat. 162 (emphasis added). As set forth in the current U.S. Code, this provision still states that the role of the Solicitor General is to “assist the Attorney General in the performance of his duties.” 28 U.S.C. § 505 (2006).

The provisions of the U.S. Code currently in effect make clear that the authority to control the litigation of the United States, including litigation in the Supreme Court, rests in the hands in the Attorney General. *See* 28 U.S.C. § 516 (“the conduct of litigation in which the United States, an agency or an officer thereof is a party, or is interested, . . . is reserved to the officers of the Department of Justice, under the direction of the Attorney General”); 28 U.S.C. § 518(a) (“Except when the Attorney General in particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suit in the Court of Claims in which the United States is interested.”); 28 U.S.C. § 518(b) (“When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States”); 28 U.S.C. § 519 (“Except as otherwise

authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency or an officer thereof is a party”).

To implement this allocation of statutory authority, the Attorney General has promulgated a regulation, 28 C.F.R. § 0.20 (2010), that delegates authority to the Solicitor General and sets forth the responsibilities of the Solicitor General as follows:

The following described matters are assigned to, and shall be conducted by, handled or supervised by, the Solicitor General, in consultation with each agency official concerned:

- (a) Conducting, or assigning and supervising, all Supreme Court cases, including appeals, petitions for and in opposition to certiorari, briefs and arguments, and . . . settlement thereof;
- (b) Determining whether, and to what extent, appeals will be taken by the Government to all appellate courts . . . [;]
- (c) Determining whether a brief *amicus curiae* will be filed by the Government, or whether the Government will intervene, in any appellate court [; and]
- (d) Assisting the Attorney General, the Deputy Attorney General, and the Associate Attorney General in the development of broad Department program policy.

Thus, as these statutes and regulations establish, the legal authority the Solicitor General exercises is authority that has been delegated from the Attorney General. The Supreme Court has recognized this. For example, in *Federal Election Commission v. NRA Political Victory Fund*, 513 U.S. 88 (1994), the Court explained that 28 U.S.C. § 518 “represents a policy choice by Congress to vest the conduct of litigation before this Court in the Attorney General, an authority which has by rule and tradition been delegated to the Solicitor General.” 513 U.S. at 96. The Supreme Court also explained this point in *United States v. Providence Journal Co.*, 485 U.S. 693, 700 (1988) (noting that the Attorney General possesses the authority under 28 U.S.C. § 518(a) to conduct the litigation of the United States, and that “[t]he Attorney General by regulation has delegated authority to the Solicitor General”).

Many previous nominees have recognized in their testimony before this Committee that the Solicitor General exercises independence within a framework that recognizes that the Solicitor General’s authority is ultimately derivative of the Attorney General’s authority. Robert Bork put it this way: “I would like to point out that the Solicitor General has the degree of freedom that he does have by custom and tradition really on condition that he not abuse it. By law he is under the Attorney General’s direction so that there is the fact that the discretion that the Solicitor

General has, I think, is reposed only because it is understood that he will not abuse it.” Charles Fried testified that: “[t]he statutes and regulations which set out the Office of the Solicitor General plainly indicate that the Solicitor General is a subordinate official of the Attorney General” and that “the way in which the Solicitor General serves the Attorney General is by giving his own best independent judgment. Now the Attorney General does not have to accept that judgment. He has got to make his own judgments, and that means that there will be occasions – there always have been and there will continue to be – on which the Attorney General, in rare cases, concludes that the judgment that his Solicitor General has given him is a judgment with which he does not concur, and in that event, he has the clear statutory authority to direct the Solicitor General to take a contrary position. There is no doubt about that.” Kenneth Starr, in his written testimony, recognized that “the Attorney General retains responsibility for and ultimate direction of the Government’s arguments before the courts.” Seth Waxman explained it this way: “it is my decision, unless I am overruled by a higher authority, to take an independent look and determine, A, whether it is constitutionally permissible to advocate that policy, and, B, where and when it is desirable to do so. And those are my independent responsibilities, as I understand it, and I am very confident that the President expects me to exercise that independent responsibility.” Paul Clement likewise acknowledged that “the Attorney General and the President . . . certainly have the power to overrule the Solicitor General.” He also stated that: “In those rare matters of such sufficient moment to come to the attention of the Attorney General, if the Attorney General reaches a different conclusion [from the Solicitor General], the most important thing is for the Solicitor General to have an opportunity to discuss the matter in an effort to reach agreement. In the event agreement cannot be reached, the Attorney General and ultimately the President have the final call.”

As I stated in response to Questions 1 through 4 above, however, there is a critical difference between stating that the Solicitor General is subject to being overruled by the Attorney General or the President, and stating that the Solicitor General has no choice but to carry out an order from the Attorney General or the President. Were I convinced that such an order was wrong (as I explain in more detail in response to Question 1 above), I would resign rather than carry out the order.

6. In your hearing, you said that there might be “circumstances in which I would feel that integrity and principle required me to resign.” You told me that “there could be circumstances in which integrity and principle would compel me to resign.” Assume that you believed reasonable arguments could be made to defend the constitutionality of a statute but your superiors instructed you not to do so. In your hearing, you appeared to say that this would not be one of those circumstances warranting resignation. So please give me a clear answer. Is that your view? Could a conflict between the Solicitor General and his superiors over whether to defend the constitutionality of a statute justify resignation?

ANSWER

I appreciate the opportunity to clarify my position on this question. I believe that a conflict between the Solicitor General and his superiors over whether to defend the constitutionality of a statute could certainly justify resignation.

If I, as Solicitor General, decided to defend an act of Congress, and the Attorney General or the President overruled that decision and ordered that the statute not be defended, based on what I believed to be partisan political considerations or other illegitimate reasons, or an indefensible view of the law, I would not lend my name or that of the Office of the Solicitor General to carrying out the order, and would certainly resign rather than carry out the order.

As I have noted, this has been the consistent position of Solicitors General in prior Administrations, and I fully share it.

**Senator Jeff Sessions  
Questions for the Record  
Donald B. Verrilli**

1. Do you agree that the Executive Branch has a clear and unwavering duty to vigorously defend the constitutionality of any law for which a reasonable defense may be made?

ANSWER

I believe that when Congress passes a law, the Department of Justice should vigorously defend that law against constitutional challenge. That is a vitally important principle and a longstanding tradition of the Department of Justice, which affords appropriate respect to Congress as a co-equal branch of government by recognizing the strong presumption of constitutionality that attaches to congressional enactments, and I fully subscribe to it. There are only two exceptions. The first is where a statute violates the separation of powers by infringing on the President's constitutional authority. The second is where there are no reasonable arguments that can be offered in defense of a statute. These exceptions are narrow and they apply only in rare circumstances, and they should be invoked only after the most grave and careful deliberation.

2. Do you agree that there is a difference between refusing to defend a law that the administration regards as unconstitutional and refusing to defend a law that the administration opposes on policy grounds?

ANSWER

Yes.

3. Do you agree that if an administration refuses to defend clearly constitutional laws based on its own policy views, it is violation of the oath to protect and defend the Constitution and the laws of the United States?

ANSWER

Yes.

4. If you are confirmed, will you commit to vigorously defend the Constitution and all federal laws for which a reasonable defense may be made?

Yes. If I am confirmed, I will vigorously defend the Constitution, and I will defend federal laws against constitutional challenge. As described in response to Question 1, there are only two exceptions to this responsibility. First, the Department of Justice will decline to defend a statute when it violates the separation of powers by infringing on the President's constitutional authority. Second, the Department of Justice will decline to defend a statute when there are no reasonable arguments that can be offered in its defense.

5. In a *Kentucky Law Journal* article, Clinton administration Solicitor General Drew Days wrote, “[t]he Solicitor General has the power to decide whether to defend the constitutionality of the acts of Congress or even to affirmatively challenge them.” Are there any federal statutes now on the books that you believe are unconstitutional?

ANSWER

If I am confirmed, it will be no part of my responsibility as Solicitor General to search for provisions in the U.S. Code to challenge as unconstitutional. To the contrary, it will be my responsibility to defend federal statutes against constitutional challenge, subject only to the two narrow and rarely invoked exceptions, as explained in my response to Questions 1 and 4 above, and I will fulfill that responsibility. As Seth Waxman explained, the Solicitor General’s office plays a “reactive” role. *Rex E. Lee Conference on the Office of the Solicitor General of the United States: Panel for Former Solicitors General*, 2003 B.Y.U. L. Rev. 153, 173 (2003)

6. At your hearing, you testified that because of your recusal, you “do not have any developed sense about the legal analysis or issues” with respect to the administration’s decision not to defend the Defense of Marriage Act (“DOMA”). Please take some time now to consider this issue and fully answer the following questions with specificity. Please also note that the fact of your recusal does not prevent you from discussing your views on this matter.

- a. In his famous *Lochner* dissent, Justice Holmes wrote:

“It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.

I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.”

- i. Do you agree or disagree with Justice Holmes’s view of judicial restraint regarding second-guessing the legislature on morally-inspired legislation, as articulated in *Lochner*?

ANSWER

I agree with the view that Justice Holmes expressed in the passage quoted above. In particular, I agree with his view that courts should be restrained in overturning the decisions of the democratically elected branches of government as reflected in duly enacted laws, including laws of the kind Justice Holmes identifies.

- ii. How would you articulate your own view in this area, especially as it relates to your likely future role as the chief federal advocate before the Court?

ANSWER

If I am confirmed, one of my principal responsibilities will be to defend federal statutes when they are challenged as unconstitutional. The principle of judicial restraint articulated by Justice Holmes will be a key framing principle in presenting arguments in defense of congressional enactments.

- b. Do you believe the federal government has a rational basis for DOMA? How would you analyze the constitutional issue on the matter, whether under the Due Process Clause or the Equal Protection Clause?

ANSWER

Because I was recused, I did not participate in any internal Department of Justice deliberations or inter-agency deliberations within the Executive Branch regarding whether reasonable arguments could be advanced in defense of the constitutionality of Section 3 of DOMA. Participation in such discussions and deliberations would be essential to developing a fully informed view on the question of whether Section 3 of DOMA could be defended under the Department of Justice's traditional standards. Thus, any opinion I can offer in response to this question is necessarily limited and provisional.

I can say, however, that, under the most deferential standard of review available under the equal protection component of the Due Process Clause, a reasonable argument can be advanced that Section 3 of DOMA has a rational basis. That conclusion is consistent with the Attorney General's February 23, 2011 letter to Speaker Boehner pursuant to 28 U.S.C. § 530D, which stated that "[i]f asked by the district courts in the Second Circuit for the position of the United States in the event those courts determine that the applicable standard is rational basis, the Department will state that, consistent with the position it has taken in prior cases, a reasonable argument for Section 3's constitutionality may be proffered under that permissive standard."

- c. Do you believe there is a federal constitutional right to same-sex marriage? Have you ever expressed an opinion as to whether there is a federal constitutional right to same-sex marriage? If so, what was that opinion?

ANSWER

The Supreme Court has not recognized a constitutional right to same-sex marriage. I do not believe I have ever expressed an opinion as to whether there is one. If I am confirmed, whatever personal views I might have respecting any legal issue will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with Executive Branch departments and agencies that the Solicitor General's Office regularly undertakes in order to determine the interests of the United States).

7. Please explain with specificity the parameters of your recusal.

- a. Did your recusal cover your time in the Office of White House Counsel?

ANSWER

Yes. It began on February 9, 2009 when I began my employment in the Administration, and I signed the Administration's ethics pledge on March 4, 2009. The recusal extends for two years; the advice of White House ethics counsel was that the preferable, more conservative approach would be to mark the technical end of the recusal period from the date I signed the pledge.

- b. If not, did you advise the President or any members of the administration with respect to DOMA?

ANSWER

I did not advise the President or any members of the administration with respect to DOMA.

8. When Attorney General Holder announced that the administration would no longer defend DOMA, he claimed that by doing so, it was acting consistent with the Justice Department's "longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense."
- a. Do you agree that there are several reasonable arguments in defense of DOMA, including that the law is rationally related to legitimate government interests in

procreation and childrearing, or do you agree with the administration that it is not rationally related to those ends?

ANSWER

The Attorney General's February 23, 2011 letter to Speaker Boehner pursuant to 28 U.S.C. § 530D concluded that "classifications based on sexual orientation should be subject to a heightened standard of scrutiny," and based on that conclusion I believe that the Attorney General concluded that there were not reasonable arguments to be made in the defense of Section 3 of DOMA. The letter also stated that "[i]f asked by the district courts in the Second Circuit for the position of the United States in the event those courts determine that the applicable standard is rational basis, the Department will state that, consistent with the position it has taken in prior cases, a reasonable argument for Section 3's constitutionality may be proffered under that permissive standard." As such, I can say (despite my necessarily incomplete understanding of the legal issues) that reasonable arguments can be advanced that Section 3 of DOMA has a rational basis under that most deferential standard of review.

- b. Do you agree that the Bush administration successfully defended DOMA using precisely the foregoing arguments?

ANSWER

My understanding is that the Department of Justice in some cases has successfully defended Section 3 of DOMA under a rational basis review standard in part based on the foregoing arguments.

- c. Do you agree that those same arguments have been widely relied on by federal and state courts in upholding states' traditional marriage laws?

ANSWER

My understanding is that some state and federal courts have upheld state restrictions on same-sex marriage in part based on those arguments, while other courts have rejected these arguments as a justification for such restrictions.

9. At your hearing, Senator Grassley asked whether you would defend DOMA if confirmed. You testified that "the President has made a decision about the Defense of Marriage Act, and the Attorney General has made a decision about the Defense of Marriage Act" and that you "would in good faith apply the traditional Justice Department standards to answering that question to the extent it has not already been decided by the President and Attorney General." However, you also explicitly testified that there are only two exceptions to the Solicitor General's obligation to defend the laws of the United States – "if in the view of the executive branch the legislation violates the separation of powers by

making an incursion into the President's constitutional domain" and "if there is no reasonable argument that can be advanced in defense of the statute."

- a. Is it your testimony that a decision by the President and/or the Attorney General that a law can no longer be defended is an exception to the Solicitor General's duty to vigorously defend all laws of the United States?

ANSWER

I appreciate the opportunity to clear up any confusion my testimony may have caused on this point, which involves both the nature of the independent judgment a Solicitor General exercises and the relationship between the Solicitor General and the Attorney General.

If I am confirmed as Solicitor General, I will adhere to the vitally important traditions of the Office and exercise my independent judgment regarding the defense of statutes and all other matters. The question of exactly what the Solicitor General's independence consists of is one on which many former Solicitors General, lawyers in the Office of the Solicitor General, and scholars have expressed a variety of opinions. For me, it means the following: The Solicitor General decides what the position of the United States will be in litigation within the Solicitor General's purview based on the law and on the Solicitor General's best judgment of what is in the long term institutional interests of the United States – partisan considerations play absolutely no role. That is true for all decisions a Solicitor General makes, and is certainly true for the determination whether reasonable arguments exist to defend an act of Congress. Therefore, if I am confirmed, I will exercise independent judgment to decide that federal statutes should be defended unless they fall into one of the two narrow and traditionally recognized exceptions – where a statute violates the separation of powers by infringing on the President's constitutional authority, or where there are no reasonable arguments that can be offered in its defense.

Although some have suggested that there is a third exception consisting of cases in which the President has publicly declared that a law is unconstitutional, I do not view it that way. Discussion of situations in which the President has made such an announcement are addressing a different issue: whether the Solicitor General or a superior officer (the Attorney General or the President) has the final say in determining what position the United States will take in court. As many previous nominees have recognized in their testimony before this Committee, the Solicitor General exercises independence within a framework that recognizes the ultimate

authority of the Attorney General (and the President) to decide what position the United States will take in court.<sup>1</sup>

Robert Bork put it this way: “I would like to point out that the Solicitor General has the degree of freedom that he does have by custom and tradition really on condition that he not abuse it. By law he is under the Attorney General’s direction so that there is the fact that the discretion that the Solicitor General has, I think, is reposed only because it is understood that he will not abuse it.” Charles Fried testified that: “The statutes and regulations which set out the Office of the Solicitor General plainly indicate that the Solicitor General is a subordinate official of the Attorney General” and that “the way in which the Solicitor General serves the Attorney General is by giving his own best independent judgment. Now the Attorney General does not have to accept that judgment. He has got to make his own judgments, and that means that there will be occasions – there always have been and there will continue to be – on which the Attorney General, in rare cases, concludes that the judgment that his Solicitor General has given him is a judgment with which he does not concur, and in that event, he has the clear statutory authority to direct the Solicitor General to take a contrary position. There is no doubt about that.” Kenneth Starr recognized that “the Attorney General retains responsibility for and ultimate direction of the Government’s arguments before the courts.” Seth Waxman explained it this way: “[I]t is my decision, unless I am overruled by a higher authority, to take an independent look and determine, A, whether it is constitutionally permissible to advocate that policy, and, B, where and when it is desirable to do so. And those are my independent responsibilities, as I understand it, and I am very confident that the President expects me to exercise that independent responsibility.” Paul Clement likewise acknowledged that “the Attorney General and the President . . . certainly have the power to overrule the Solicitor General.” He also stated that: “In those rare matters of such sufficient moment to come to the attention of the Attorney General, if the Attorney General reaches a different conclusion [from the Solicitor General], the most important thing is for the Solicitor General to have an opportunity to discuss the matter in an effort to reach agreement. In the event agreement cannot be reached, the

<sup>1</sup> The relevant provisions of the U.S. Code make clear that the authority to control the litigation of the United States, including litigation in the Supreme Court, rests in the hands in the Attorney General. *See* 28 U.S.C. § 516 (“the conduct of litigation in which the United States, an agency or an officer thereof is a party, or is interested, . . . is reserved to the officers of the Department of Justice, under the direction of the Attorney General”); 28 U.S.C. § 518(a) (“Except when the Attorney General in particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suit in the Court of Claims in which the United States is interested.”); 28 U.S.C. § 518(b) (“When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States”); 28 U.S.C. § 519 (“Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency or an officer thereof is a party”). The Attorney General has, by regulation, delegated to the Solicitor General the authority to conduct the litigation of the United States in the Supreme Court. 28 C.F.R. § 0.20 (2006).

Attorney General and ultimately the President have the final call.” The Supreme Court has also recognized that Congress has “vest[ed] the conduct of litigation before this Court in the Attorney General, an authority which has by rule and tradition been delegated to the Solicitor General.” *Federal Election Commission v. NRA Political Victory Fund*, 513 U.S. 88, 96 (1994).

But the fact that the President and the Attorney General have authority over the Solicitor General is entirely distinct from the question whether a Solicitor General should carry out an order despite a conviction that doing so would be wrong. As I address more fully in response to Question 10 below, if I am confirmed, while I could not defy an instruction from my superiors, I also would not carry out an order that I believed was wrong. I would have the choice, and I would make the choice, to resign rather than lend my name or that of the Office of Solicitor General to carrying out an order I believed was wrong.

I do believe that it is highly unlikely that such a circumstance would arise in the tenure of any Solicitor General, because Attorneys General and Presidents have come to appreciate the importance of affording the Solicitor General the ability to make independent judgments based on the law and the long-term institutional interests of the United States. This exercise of independent judgment allows the Solicitor General’s Office – in the words of Rex Lee, one of the finest Solicitors General – to “provide the Court from one administration to another – and largely without regard to either the political party or the personality of the particular Solicitor General – with advocacy which is more objective, more competent, and more respectful of the Court as an institution than it gets from any other group of lawyers.” Independence thus allows the Solicitor General to fulfill his or her responsibilities as an officer of the Supreme Court. At the same time, the reservoir of credibility that such advocacy builds up will serve the interests of any President and any administration in achieving its overall objectives, even if an administration must forgo taking a position that might advance a particular administration objective in a particular case. This independence also fosters respect for Congress as a co-equal branch of government. Finally, it will always benefit the Attorney General and the President to receive the independent and expert legal judgment of the Solicitor General to mark the boundaries of what the law will allow, and ensure that an administration’s legal policy objectives are achieved in fidelity to the rule of law.

- b. If not, does the defense of DOMA fall under one of the two exceptions to the Solicitor General’s duty to defend the laws of the United States that you articulated at your hearing? If so, which one?

ANSWER

The Attorney General has stated that the defense of Section 3 of DOMA falls into the recognized category of cases in which the Department of Justice cannot offer a reasonable argument in defense of the statute's constitutionality. For the reasons explained above, the Attorney General has the authority to make that judgment.

10. You testified that if you believed reasonable arguments existed to defend a statute's constitutionality, but the Attorney General or President concluded otherwise, you "would defend the statute unless instructed by [your] superior not to do so." However, you also testified that "the duty of the Solicitor General is to advance the long-term institutional interests of the United States, and it is not a partisan job." Please explain how declining to defend a law for which you believe there are reasonable grounds at the direction of your "superior" is consistent with the duty of the Solicitor General "to advance the long-term institutional interests of the United States."

ANSWER

I appreciate the opportunity to clarify my position on this issue. What I meant to convey was that if I were instructed by my superiors not to defend a statute, I could not defy that instruction and proceed with the defense of the statute. The Solicitor General lacks any such authority. As Charles Fried testified during his confirmation hearing (and as I addressed more fully in response to Question 9a above), "[t]he statutes and regulations which set out the Office of the Solicitor General plainly indicate that the Solicitor General is a subordinate official of the Attorney General" and the Attorney General "has the clear statutory authority to direct the Solicitor General to take a contrary position" to the position the Solicitor General would take in the exercise of his or her own independent judgment. Disregarding such a command would be insubordination and would itself violate the rule of law. But I also did not mean to suggest that I would carry out an order despite my conviction that doing so was wrong.

If I, as Solicitor General, decided to defend an act of Congress, and the Attorney General or the President overruled that decision and ordered that the statute not be defended, based on what I believed to be partisan political considerations or other illegitimate reasons, or an indefensible view of the law, I would not lend my name or that of the Office of the Solicitor General to carrying out the order, and would certainly resign rather than carry out the order.

I believe that the long-term interests of the United States would be best served by a Solicitor General who adheres to such a course of decision and action, ensuring not only that he acts with the independence that I discussed in response to Question 9a, above, but also with the integrity to resign if and when appropriate.

11. In 1976, the Justice Department was faced with defending the Federal Election Campaign Act, which the Attorney General, Edward Levi, and Solicitor General, Robert Bork, believed was unconstitutional under the First Amendment as a restriction of political speech. Their solution was to delegate to the senior deputy of the Solicitor General's office the defense of the statute, thus ensuring a first-rate defense. Simultaneously, the Attorney General and Solicitor General filed a friend-of-the-court brief exploring the difficulties of the statute but not taking sides in the dispute. In this way, they both called attention to the very considerable difficulties the Constitution posed for the statute and mounted the best defense of it that they could.
- a. Do you agree with this approach?

ANSWER

Based on histories and scholarly commentary I have read in the past regarding the approach the Department of Justice took in the Supreme Court in *Buckley*, I believe the decision to file multiple briefs was a reasonable attempt to deal with the difficulties that can arise in the rare but important cases in which the Executive Branch has grave doubts about the constitutionality of an act of Congress. Such cases involve the pressure of potentially conflicting obligations to defend the statutes Congress enacts and to uphold the Constitution and take care that it, as the supreme law of the land, is faithfully executed. As I understand the history in *Buckley*, the Solicitor General and the Attorney General believed that certain provisions of the 1974 Federal Election Campaign Act violated the First Amendment. They therefore submitted to the Supreme Court an *amicus* brief identifying what they believed were the many constitutional difficulties with the statute. But the Solicitor General's Office also submitted a brief defending the statute against the First Amendment challenges. This approach did allow the Department of Justice to defend the statute, but some have said that the Department's decision to file an additional *amicus* brief pointing out the constitutional problems with the statute undermined the effectiveness of the Office's defense of the statute.

- b. Do you agree that given the administration's position on DOMA, the approach taken by Attorney General Levi and Solicitor General Bork is more consistent with the duty to defend laws of the United States than its current strategy of abandoning the law altogether and abdicating its duty to defend to the House of Representatives?

ANSWER

As noted in my response to Question 11a above, the approach of the Department of Justice in the *Buckley* litigation is one reasonable option for dealing with this difficult issue. But it is not clear that it is more consistent with the goal of ensuring a first-rate defense of federal statutes. Some have suggested that, by sending a mixed message to the Supreme Court, it does not best advance the goal of ensuring a first-rate defense of the statute. The procedures Congress established in 28 U.S.C. § 530D could in some circumstances be considered a better means of ensuring a first-rate defense of

the statute. If the Department of Justice declines to defend a statute, and through § 530D ensures that Congress has the opportunity to step in and defend the constitutionality of the statute, that approach may achieve the goal of a first-rate defense of the statute without the risk of mixed messages.

- i. If not, do you at least agree that it is important that the Solicitor General be able to perform both tasks in appropriate cases?

ANSWER

Yes.

- ii. Do you agree that the Solicitor General's office is required to give every constitutional issue it is confronted with the scrutiny it requires?

ANSWER

Yes.

- iii. Do you agree that, in the absence of that scrutiny, the defense of a major statute may be inadequate?

ANSWER

Yes.

12. In August 2009, the Justice Department, under former Solicitor General Kagan, filed a reply brief in *Smelt v. United States*, challenging DOMA. In that brief, the Justice Department volunteered that "this Administration does not support DOMA as a matter of policy, believes that it is discriminatory, and supports its repeal" and asserted that it "does not believe that DOMA is rationally related to any legitimate government interests in procreation and child-rearing."

- a. I am assuming that, based on your testimony, you were recused from participation in this case. If not, please correct that assumption. However, regardless of whether you were recused, as Senator Blumenthal said at your hearing, you are "an expert appellate litigator" who "has participated in more than 100 cases before the Supreme Court, including 12 arguments [and] about 90 cases before the United States Court of Appeals and the State supreme courts, arguing [your]self over 30 of those appeals." Is it your expert opinion that this brief was necessary to support the government's positions in the case?

ANSWER

Because I was recused, I did not participate in any of the deliberations or have knowledge of any of the judgments that went into the decision of how best to

defend the constitutionality of Section 3 of DOMA in the *Smelt* case or any other. Such deliberations are critical to developing a fully informed sense of the matter. With that caveat, and stressing that I have no knowledge as to how these judgments were actually made, I can see why attorneys litigating the case for the United States might have concluded that such statements were necessary in order to defend the constitutionality of the law effectively. At the time the brief was filed, it was public knowledge that the Administration did not support DOMA as a matter of policy and supported its repeal. Attorneys litigating the case might have concluded that their duty of candor to the court – a duty to which Department of Justice lawyers must adhere scrupulously – required such a statement. They might also have concluded that it was better as a litigation strategy to point out the Administration’s policy objections to Section 3 of DOMA themselves, in a manner that afforded them some control over how those objections would be portrayed, rather than leaving it to opposing counsel to point out the Administration’s position in the first instance. The litigators might also have preferred to put the court on notice through the briefing so as to avoid having to deal with the issue for the first time at oral argument.

- b. Would you characterize the brief as a “vigorous” defense of the law?

ANSWER

Based on my limited and provisional knowledge, I think it would be fair to characterize the brief as “vigorous” for the reasons set forth in response to Question 12a above.

13. Because of her widely-publicized opposition to Don’t Ask, Don’t Tell and the Solomon Amendment, Justice Kagan was specifically asked at her confirmation hearing on her nomination to be Solicitor General if she would be able to defend those laws as Solicitor General. She answered, in part, that she would “apply the usual strong presumption of constitutionality,” as reinforced by “the doctrine of judicial deference to legislation involving military matters.”

However, during her tenure as Solicitor General, two cases challenging Don’t Ask, Don’t Tell came up – *Pietrangelo v. Gates* in the First Circuit and *Witt v. Department of the Air Force* in the Ninth Circuit. In both cases, the plaintiffs argued that the Supreme Court’s recent decision in *Lawrence v. Texas*, meant that the Don’t Ask, Don’t Tell law should be struck down as unconstitutional. The First Circuit upheld the law, correctly deferring to military policy, analyzing the issue as a general matter, and refusing to order a series of trials where the government would have to justify the application of the law to each individual service member. In contrast, the Ninth Circuit did not apply the traditional deference for military policy and instead invented a new standard of review for the plaintiff’s “Substantive Due Process” challenge, and held that the plaintiff was entitled to a trial where the Government would have to defend the application of the law to the individual plaintiff in that case.

- a. *Pietrangelo* was decided in June 2008. The losing side decided to seek an appeal to the Supreme Court, and after a series of delays, the government had to decide by early May 2009 whether it would support or oppose the Supreme Court taking the case. You were Associate Deputy Attorney General at that time. Were you at all involved in that process? If so, please explain your involvement.

ANSWER

I had no involvement in that decision.

- b. In the Solicitor General's May 2009 brief to the Supreme Court, the government urged the Court not to take *Pietrangelo*, and pointed to *Witt* as a better vehicle for the Court to hear constitutional challenges to Don't Ask, Don't Tell. Were you at all involved in that decision? If so, please explain your involvement.

ANSWER

I had no involvement in that decision.

- c. Three days earlier, on May 3, 2009, the government also decided not to seek an appeal from the Ninth Circuit's decision in *Witt*. Were you at all involved in that decision? If so, please explain your involvement.

ANSWER

I had no involvement in that decision.

- d. Do you agree that, by refusing to appeal *Witt*, the government essentially blocked the Supreme Court from considering the constitutionality of Don't Ask, Don't Tell at that time?
- i. Do you think allowing the case to go forward in the District Court was consistent with the duties of the Solicitor General to vigorously defend the law?

ANSWER

Because I had no involvement in the decision, I did not participate in the analysis and deliberations in the Department of Justice or in the deliberations that I presume occurred between the Department of Justice and the Department of Defense prior to the decision not to seek certiorari in the *Witt* case in 2009. I have reviewed the April 24, 2009 letter from the Attorney General pursuant to 28 U.S.C. § 530D, that set forth the basis for the Department's decision. The letter explains that the decision not to seek certiorari at that time was based on two principal considerations: (i) the interlocutory posture of the case, and the Supreme Court's presumption

against granting certiorari in a case before a final judgment has been rendered; and (ii) the judgment that the development of a factual record on remand in the district court would strengthen the government's case on appeal after a final judgment. Without having the kind of detailed understanding of the case that would have come from participating in the analysis and deliberations within the Department of Justice and with the Department of Defense, I can only say that the explanation offered in the § 530D letter certainly could reflect a litigation judgment consistent with a duty to defend the law vigorously. Specifically, the litigators might reasonably have concluded that the case would be in a better posture for eventual Supreme Court review after a remand to develop a full factual record that could potentially have refuted the allegations in the plaintiff's complaint.

- e. The Solicitor General's office under the Bush Administration fully recognized the damage that would result if the Ninth Circuit's decision in *Witt* was not immediately appealed. That is why they quickly sought *en banc* review by the full Ninth Circuit. They said the decision "creates an inter-circuit split, . . . a conflict with Supreme Court precedent, and an unworkable rule that cannot be implemented without disrupting the military." Do you agree with the Bush administration's approach, or former Solicitor General Kagan's approach?

ANSWER

Because I had no involvement in the matter, I did not participate in the analysis and deliberations in the Department of Justice or in the deliberations that I presume occurred between the Department of Justice and the Department of Defense prior to the decision not to seek certiorari in the *Witt* case in 2009. Without having the kind of detailed understanding of the case that would have come from participating in the analysis and deliberations within the Department of Justice and with the Department of Defense, I can only say that the question whether to seek *en banc* review in a court of appeals is not the same as the question whether to seek Supreme Court review, and therefore it could well be possible to conclude that both choices were sensible litigation judgments. For example, once the Ninth Circuit denied *en banc* review in the *Witt* case, the Department of Justice litigators could well have concluded that the more prudent course was to allow the case to return to the district court.

14. According to case records, you wrote and submitted an *amicus* brief in the Sixth Circuit litigation in *ACLU v. NSA*, where the ACLU and a group of lawyers sued the National Security Agency claiming that they were injured and had standing to challenge the Terrorist Surveillance Program – the program that reportedly monitored al Qaeda and terrorist communications – because they communicated regularly with clients overseas and those communications might be chilled as a result of the surveillance program. The Sixth Circuit dismissed this case for lack of standing.
- a. Please provide a copy of the *amicus* brief that you submitted.

ANSWER

A copy is being provided with this response.

- b. Did your brief advocate in favor of granting standing to the ACLU and the group of lawyers to challenge the Terrorist Surveillance Program based on what was nothing more than a fear of possible surveillance?

ANSWER

No. The brief, which was filed on behalf of two organizations that were participating in the case as *amici curiae* – the Constitution Project and the Center for National Security Studies – did not address the standing issue or press any argument in favor of standing for the plaintiffs in the case. The brief addressed only the question on the merits regarding whether the Terrorist Surveillance Program could be justified as lawful.

- c. The Second Circuit ruled two weeks ago in *Amnesty International v. Clapper* that a similar group of civil rights organizations and lawyers did have standing to sue on the same grounds asserted in *ACLU v. NSA*, albeit under the section of FISA enacted in 2008 to deal with interception of overseas communication. Given your advocacy on this issue in the past – essentially the same issue – do you plan to recuse yourself from any consideration of this matter, including whether the United States should appeal the Second Circuit’s ruling?

ANSWER

If I am confirmed, I will consult with Department of Justice ethics officials and other officials as appropriate, before determining whether recusal is required. Prior to such consultation and analysis, I cannot say definitively that I would not recuse myself from this matter. Based on what I know now, however, it does not seem likely to me that recusal would be required. The *Clapper* case in the Second Circuit involves a statute that was not at issue in *ACLU v. NSA*; the *Clapper* case raises a different legal issue than in *ACLU v. NSA*; I represented *amici* and not a party in *ACLU v. NSA*; the brief I filed did not take a position on the standing issue; and the case was several years ago. Assuming I am not recused, I will advocate the position of the United States vigorously in the *Clapper* case. The case involves a challenge to a federal statute and I would have a responsibility to defend that statute vigorously.

- d. Did you personally believe the Terrorist Surveillance Program was unconstitutional before it was brought under FISA?

ANSWER

The brief I filed in *ACLU v. NSA* set forth the views of the clients I was representing as *amici*. The brief advanced arguments based on the familiar separation of powers

framework set forth in Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*. If I am confirmed (and if I am not recused from this matter), whatever my personal views might be, those views will play no part in the discharge of my duties. It will be my responsibility to apply the same standards in cases involving challenges to the Terrorist Surveillance Program that I would apply in any case – standards that are based entirely in the law and seek to advance the long term institutional interests of the United States. And I will do so.

- c. There was a significant debate prior to the enactment of the FISA Amendments Act regarding whether telecommunications carriers should receive immunity for any assistance they provided to the federal government through the Terrorist Surveillance Program. What position did you take – whether publicly or in informal settings – regarding the question of immunity for these carriers?

ANSWER

I do not believe that I took a position one way or the other – publicly or in informal settings – regarding the question of immunity for telecommunications carriers under the FISA Amendments Act.

15. You clerked for Justice Brennan from 1984 to 1985 and have attributed your passion for *pro bono* work in capital cases to that experience. Justice Brennan believed that the death penalty was unconstitutional under any circumstances. In his concurrence in *Furman v. Georgia*, he, along with Justice Marshall, wrote that they would have held any use of the death penalty is *per se* a violation of the Eighth Amendment.
- a. Do you agree with Justice Brennan that the death penalty is *per se* unconstitutional? If not, do you agree that the death penalty is constitutional in most circumstances in which it is imposed?

ANSWER

In *Gregg v. Georgia* in 1976, the Supreme Court held that capital punishment is not *per se* unconstitutional. *Gregg* and its progeny have remained the law for more than 30 years, and if I am confirmed, that is the law that I will follow in carrying out the obligations of the office. Although I am not familiar with the facts and procedures in each case, in general I believe it is reasonable to conclude that the death penalty has been constitutionally imposed in most circumstances under *Gregg* and its progeny.

- b. Do you agree that Justices Brennan and Marshall engaged in judicial activism when they ignored the text of the Constitution and centuries of Supreme Court precedent in an effort to outlaw capital punishment?

ANSWER

The term “judicial activism” means different things to different people. I believe Justices Brennan and Marshall made their decisions on the basis their understandings of the text of the Eighth Amendment, relevant history, and the Supreme Court’s Eighth Amendment precedent.

16. You have represented several death row inmates before the Supreme Court, the lower federal courts, and state courts, many of these *pro bono*. According to a July 18, 2007 article in the *National Law Journal*, you consider these representations to be “different” and “more emotional.” You further stated:

“I try very hard to make it as dispassionate and law-focused as I can. . . . But I do want the justices to understand that when I say it, I really believe it. I believe that the inadequacy of the representation [the defendants] got is as shockingly bad as I am telling them it is. . . . In part it’s what I bring to it, but also what the justices bring. It’s emotionally charged on both ends.”

- a. Did the article accurately recount your statements? If not, please take this opportunity to correct the record.

ANSWER

The article accurately quotes my statements. In these quotes, I was trying to convey my conviction that enforcement of the Sixth Amendment right to the effective assistance of counsel was essential to the legitimacy of the adversarial process, and thus of particular importance in cases in which a defendant faces a death sentence.

- b. During the confirmation process for her nomination to be Solicitor General, Elena Kagan stated that her “role as Solicitor General . . . would be to advance not my own views, but the interests of the United States” and that she was “fully convinced” that she could “represent all of these interests with vigor, even when they conflict with my own opinions.” Do you agree that is the duty of the Solicitor General?

ANSWER

Yes. I am in complete agreement with the views Justice Kagan expressed in her testimony. During my career in private practice I represented a wide variety of clients in cases raising a wide variety of legal and policy issues. I represented the interests of those clients vigorously and to the best of my ability without regard to my own views of what the law should be. I understand that, if I am fortunate enough to be confirmed, I will have a special obligation to represent the interests of the United States with vigor and to the best of my ability even if doing so conflicts with my own opinion in a particular matter. And I will do so.

17. In *Wiggins v. Smith* you represented the defendant, who was convicted of drowning a 77-year-old Maryland woman in her bathtub during a robbery and was sentenced to death. In the 2007 *National Law Journal* article cited above, you were quoted as saying you had “a strong emotional connection” to the defendant and described him as “the most sympathetic” of the defendants you have represented because “[h]e had no prior criminal record; he had not engaged in preying on others.” Do you think it is possible that the circumstances of a crime could be so extreme that the defendant’s lack of a criminal record is irrelevant?

ANSWER

I do think that the circumstances of a crime could be so extreme that a death penalty would be warranted under applicable law even if a defendant lacks a criminal record. Under the Eighth Amendment law articulated by the Supreme Court in *Gregg* and its progeny, a capital defendant is afforded the opportunity to present to the sentencing authority any reasonable argument in mitigation of punishment, and the courts (as well as some state capital punishment statutes) have generally recognized that the lack of a criminal record is one such mitigating circumstance. But I certainly agree that the absence of a prior criminal record is never a *per se* bar to imposing the death penalty in an appropriate case.

18. On at least three occasions, while serving as *pro bono* counsel to death row inmates, you have challenged the so-called three-drug protocol mode of execution as violative of the Eighth Amendment’s prohibition on cruel and unusual punishment.
- a. While you are free to argue for marginal issues as an advocate, do you personally believe this violates the Eighth Amendment?

ANSWER

In each of the three cases, I was approached by counsel who had filed the cases and had litigated them in the lower courts, and was asked to provide assistance. In each of the cases, I agreed to do so and advanced legal arguments on behalf of the clients to the best of my abilities. In making those arguments I did not take the position that the three-drug protocol is inherently cruel and unusual punishment.

For example, the brief I filed on behalf of my clients in the Supreme Court in *Baze v. Rees* acknowledged that the lethal injection “method of execution is not inherently inhumane if performed properly,” but then argued that the particular procedures that Kentucky used to carry out executions created a serious risk of errors that could result in the infliction of extreme suffering. In rejecting this claim, the Supreme Court ruled that Kentucky’s procedures did not pose a substantial risk of serious harm, and therefore did not violate the Eighth Amendment. As the Court pointed out, the trial record in the case provided only limited support for the assertion of an unacceptably high risk of harm – an outcome that I find fair and reasonable on the basis of the record evidence.

Similarly, the Eighth Circuit case of *Crawford v. Taylor* did not involve a claim that lethal injection is inherently cruel and unusual punishment, but instead challenged the adequacy of the particular procedures Missouri used to carry out lethal injections. After the State instituted significant changes to the procedures in response to the lawsuit, the Eighth Circuit held that the revised procedures did not present a constitutionally intolerable risk of error.

*Hill v. McDonough*, a case in which I served as co-counsel in the Supreme Court, did not directly raise the question whether lethal injection is constitutional. The case instead raised the question whether challenges to lethal injection procedures could be brought in a case under 42 U.S.C. § 1983.

During my career in private practice I represented a wide variety of clients in cases raising a wide variety of legal and policy issues. I represented the interests of those clients vigorously and to the best of my ability without regard to my own views of what the law should be. I understand that, if I am fortunate enough to be confirmed, I will have a special obligation to represent the interests of the United States with vigor and to the best of my ability, regardless of my personal views of the matter. And I will do so.

- b. If confirmed, will you commit to vigorously defending any challenges to this protocol?

ANSWER

Yes, if I am confirmed I will vigorously defend challenges to the federal government's use of lethal injection as a method of execution. Consistent with my obligation to act in the long-term institutional interest of the United States, I will make decisions regarding this and all other issues based on the facts and the law, including the settled law set forth in *Baze v. Rees*.

19. On April 1, 2009, the *Washington Post* reported that the Office of Legal Counsel at the Department of Justice issued a legal opinion that the D.C. voting rights legislation then being considered by Congress was unconstitutional. The story further stated that, upon receiving this legal opinion, Attorney General Holder sought an alternative opinion from the Solicitor General's office. According to the story, lawyers in the Solicitor General's office "told [Attorney General Holder] that they could defend the legislation if it were challenged after its enactment." Do you believe it was appropriate for the office of the Solicitor General to render an advisory opinion about a pending bill that was not even yet a law?

ANSWER

I cannot speak to the specifics of the deliberations implicated by this question, because of Executive Branch confidentiality interests, but I can say that I believe it is generally within the authority of the Attorney General to seek the legal advice of the Solicitor General on a legal topic, consistent with and respectful of the particular roles of the Office of the Legal Counsel and the Office of the Solicitor General. One of the functions delegated by regulation from the Attorney General to the Solicitor General is to “assist[] the Attorney General, the Deputy Attorney General, and the Associate Attorney General in the development of broad Department program policy.” And the Attorney General can always, when appropriate, call on the other officers in the Department to assist him in the discharge of his duties.

20. According to your questionnaire, during your tenure as Associate Deputy Attorney General at the Department of Justice, you supervised the work of the Civil Rights Division for a “brief period.”
- a. What were the exact dates during which you were responsible for supervising the Civil Rights Division?

ANSWER

I arrived at the Department of Justice as an Associate Deputy Attorney General in early February 2009. Beginning then, my responsibilities included monitoring the civil litigating divisions of the Department (Antitrust, Civil, Civil Rights, Environment and Natural Resources, and Tax) on behalf of the Deputy Attorney General. I do not remember the exact date on which responsibility for monitoring the Civil Rights Division shifted from me to another Associate Deputy Attorney General, but I believe it was in May 2009.

- b. Were you involved in any way with the Department’s decision to dismiss three defendants from *United States v. New Black Panther Party for Self-Defense, et al.*, No. 2:09cv0065 (E.D. Pa. May 18, 2009)? If so, please explain your involvement and the decisionmaking process.

ANSWER

I played no part in the Department’s decisions respecting *United States v. New Black Panther Party for Self-Defense, et al.*, including the decision to dismiss defendants. As part of my monitoring responsibilities, I was generally aware of the case and of the decision to dismiss defendants. I reported on the case, along with many others, to the Deputy Attorney General. As a regular part of my duties as Associate Deputy Attorney General, I attended meetings in the Department at which reports on the case were given.

**Written Questions of Senator Tom Coburn, M.D.**

Donald Verrilli

*Nominee, to be Solicitor General*

U.S. Senate Committee on the Judiciary

April 6, 2011

1. You were counsel of record for an *amicus* brief filed by the Rockefeller Foundation in *National Endowment for the Arts (NEA) v. Finley*, which challenged a statute requiring the NEA to consider “general standards of decency and respect for the diverse beliefs and values of the American public” in making art grants. In your brief, you argued the statute “imposes impermissible viewpoint-based criteria on NEA grants.” Your brief further argues that the statute violates the First Amendment because “Congress has no more power to discriminate against unconventional views when it is f[u]nding private expression than when it is restricting private expression directly.”
  - a. Congress uses its spending power to coerce actions all the time. Are there any other grants or appropriations you think are unconstitutional? I would note that the Supreme Court rejected your argument in the brief, but I’m wondering how far your logic extends.

ANSWER

The *amicus* brief I filed in *National Endowment for the Arts v. Finley* was for the Rockefeller Foundation and set forth the legal arguments that the Foundation wanted to present to the Supreme Court. The brief makes an argument that Congress cannot use the spending power to impose viewpoint-based restrictions on grants that fund expressive activity, if those restrictions would violate the First Amendment had Congress sought to impose them directly.

If I am confirmed as Solicitor General, it will be my responsibility to defend federal grants and congressional appropriations when they are challenged in court. Should a question like the one presented in *National Endowment for the Arts v. Finley* come before the courts, the decision in that case would be one of the defensive tools I would employ. Whatever personal views I might have respecting any legal issue – and whatever the views of my former clients – they will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with executive branch departments and agencies that the Solicitor General’s Office regularly undertakes in order to determine the interests of the United States).

- b. For example, do you agree with the judge in *Commonwealth of Massachusetts v. Health and Human Services* that the Defense of Marriage Act (DOMA) violates the 10<sup>th</sup> Amendment and is inducing states to violate the equal protection rights of their citizens because it imposes an unconstitutional condition on the receipt of federal funding? Please explain.

ANSWER

Because I was recused, I did not participate in any internal Department of Justice deliberations or inter-agency deliberations within the executive branch regarding whether reasonable arguments could be advanced in defense of the constitutionality of Section 3 of DOMA. Participation in such discussions and deliberations would be essential to developing a fully informed view on the question of whether Section 3 of DOMA could be defended under the Department of Justice’s traditional standards. Thus, any opinion I

can offer in response to this question is necessarily limited and provisional. I can say, however, that, under the most deferential standard of review available under the equal protection component of the Due Process Clause, a reasonable argument can be advanced that Section 3 of DOMA has a rational basis. That conclusion is consistent with the Attorney General's February 23, 2011 letter to Speaker Boehner pursuant to 28 U.S.C. § 530D, which stated that "[i]f asked by the district courts in the Second Circuit for the position of the United States in the event those courts determine that the applicable standard is rational basis, the Department will state that, consistent with the position it has taken in prior cases, a reasonable argument for Section 3's constitutionality may be proffered under that permissive standard."

2. In contrast, to your brief in the NEA case, you acted as counsel of record in an *amicus* brief filed by The Coalition to Stop Gun Violence in *Printz v. US*. In that brief you argued in support of a provision in the Brady Act requiring state law enforcement officials to conduct background checks on prospective handgun purchasers. You argued that the bill did not violate the principles of federalism and state sovereignty as embodied in the Constitution and the 10<sup>th</sup> Amendment because the act did not compel state legislatures to enact laws, "but merely enlisted state officers to help enforce a federal program for a temporary period of time." Further, you argued that the law "must be upheld because the compelling federal interest in immediately addressing the epidemic of handgun violence greatly outweighs the minimal and temporary obligations placed on the states." The Supreme Court rejected your position in a 5 to 4 decision.
  - a. How do you reconcile these two arguments when, in NEA you are arguing that the conditioning of federal funding violates the First Amendment, but requiring certain actions by state officials in the *Printz* case does not violate the 10<sup>th</sup> Amendment?

ANSWER

The brief I filed in *Printz v. United States* was for the Coalition to Stop Handgun Violence. The case involved a challenge, on Tenth Amendment grounds, to a federal law that required State governments to administer (for a limited period of time) a federal background check system for firearms purchases. The requirement was imposed directly on state governments. Thus it did not raise any question regarding potential constitutional limits on the kinds of conditions Congress can attach to federal funds when Congress acts under the Spending Power. Rather, the question in the case was to what extent, if any, the federal government could directly require a state government to cooperate in the administration of a federal program, consistent with the state sovereignty interests that the Tenth Amendment protects. Therefore, I do not believe there was any inconsistency with the arguments I advanced on behalf of the Rockefeller Foundation in the *NEA v. Finley* case, which did not involve a Tenth Amendment question and involved an exercise of the Spending Power.

To the extent there had been any inconsistency between the position I took on behalf of the *amicus* group in *NEA v. Finley* and the position I took on behalf of the *amicus* group in *Printz v. United States*, it would be explained by the fact that I was advocating for different clients with different interests in different cases raising distinct legal issues. A lawyer in private practice representing a client has an obligation to represent the interests of the client vigorously, and it is not uncommon for lawyers to advocate legal positions on behalf of one client that are not entirely consistent with legal positions advanced on behalf of a different client in a different matter.

- b. Do you continue to believe your arguments in both of these cases were supported by the law at the time?

ANSWER

I believe that the arguments advanced on behalf of my clients in both cases had a solid foundation in the law at the time they were made. In both cases, the court of appeals had agreed with the legal position I advocated on behalf of my client in the Supreme Court, and in both cases the Supreme Court was divided.

3. You filed an *amicus* brief in support of a petition for cert in the Supreme Court case of *Housel v. Head*. Housel had been sentenced to death for a brutal and murderous crime spree spanning several states. Housel appealed his sentence arguing ineffective assistance of counsel. The arguments in your brief were based on “international human rights” and cited several international law sources. In fact you concluded by arguing that “[i]t is in the interests of the United States and the world community that the legal standards of the United States should reflect and be informed by international human rights.” The Supreme Court rightfully denied cert in this case. If you are confirmed as Solicitor General, will you argue for legal standards that reflect international human rights?

ANSWER

In *Housel v. Head*, I filed an *amicus* brief as counsel for Members of Parliament of the United Kingdom as well as two professional legal organizations – the Law Society of England and the Human Rights Committee of the Bar of England and Wales. They had an interest in the case because the criminal defendant was a British subject. The legal arguments set forth in the brief represented the position that those Members of Parliament and professional organizations wanted to present to the Supreme Court. I served as their lawyer and presented their views.

If I am confirmed, my responsibility as Solicitor General will be to represent the United States, and to make determinations about what position the United States should take in the Supreme Court on the basis of the Constitution and laws of the United States. In making those determinations, I will adhere to my view that foreign law, including international human rights law, has no authoritative force in interpreting the Constitution and laws of the United States, except in those rare instances in which federal statutes incorporate or make international and/or foreign court decisions binding legal authority.

- a. Other than the interpretation of treaties, in which cases could you foresee including any citation to international law in your argument or brief?

ANSWER

Generally, if I am confirmed, I do not foresee relying on international law in arguments or briefs because, apart from the interpretation of treaties, international law should have no authoritative force in interpreting the Constitution and laws of the United States. There are circumstances in which I could foresee including citations to English common law predating American independence, because that law can sometimes illuminate the understanding of the Framers and therefore inform interpretation of the Constitution. There are also circumstances in which the Supreme Court’s jurisprudence makes reference to international law – specifically the laws of war – relevant in interpreting domestic law. For example, in *Hamdi v. Rumsfeld*, Justice O’Connor’s plurality opinion looked to traditional law of war principles to inform analysis of the lawfulness, scope and duration of military detention under the 2001 Authorization for the Use of Military Force (AUMF). Future litigation regarding detention under the AUMF may therefore require some reference to the laws of war. Finally, it may be necessary in briefs and arguments to respond to claims made by persons adverse to the interests of the United States that rely on international law.

For Opinion See [493 F.3d 644](#) , [467 F.3d 590](#)

United States Court of Appeals,

Sixth Circuit.

AMERICAN CIVIL LIBERTIES UNION, et al., Plaintiffs--Appellees/Cross-Appellants,

v.

NATIONAL SECURITY AGENCY, et al., Defendants--Appellants/Cross-Appellees.

Nos. 06-2095, 06-2140.

November 17, 2006.

On Appeal from the United States District Court for the Eastern District of Michigan

Brief for Amici Curiae Center for National Security Studies and the Constitution Project

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#### INTERESTS OF AMICI CURIAE

The Constitution Project is a bipartisan nonprofit organization that seeks to build consensus on and develop solutions to contemporary legal and constitutional issues through a combination of scholarship and public education. After September 11, 2001, the Project created its Liberty and Security Initiative, a bipartisan, blue-ribbon committee of prominent Americans, to address the importance of preserving civil liberties even as we work to enhance our Nation's security. The Initiative develops policy recommendations on such issues as the use of military commissions and governmental surveillance policies, which emphasize the need for all three branches of government to play a role in safeguarding constitutional rights. In December 2005, the Initiative released a statement criticizing the recently disclosed domestic surveillance program of the National Security Agency ("NSA"). In addition, the Project's Courts Initiative conducts public education on the importance of an independent judiciary and cautions against legislation or executive branch practices that would limit the substantive jurisdiction of courts. The Project's bipartisan blue-ribbon War Powers Initiative also released a report in June 2005 entitled "Deciding to Use Force Abroad: War Powers in a System of Checks and Balances," which makes recommendations regarding the respective war powers of all three branches of government.

The Center for National Security Studies is a nonpartisan civil liberties organization that was founded in 1974 to ensure that civil liberties are not eroded in the name of national security. The Center seeks solutions to national security problems that protect both the civil liberties of individuals and the legitimate national security interests of the government. For more than thirty years, the Center has worked to protect the Fourth Amendment rights of individuals to be free of unreasonable searches and seizures, especially when conducted in the name of national security. Over the years, the Center has filed briefs and lawsuits concerning the lawfulness of surveillance.

*Amici* have a direct interest in the substantive issues this case presents. *Amici* will not address the threshold questions of whether the plaintiffs in this case have standing or whether the “state secrets” privilege applies, except to state that *amici* believe this Court has both the authority and ability to address the substantive constitutional challenges plaintiffs present to the NSA’s warrantless surveillance activities. The parties have consented to the filing of this brief.

#### INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a challenge to the recently revealed program of the NSA, first authorized by the President in the fall of 2001, to conduct systematic warrantless electronic surveillance of persons in the United States, in direct violation of the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1871 (“FISA”). Through FISA and its criminal law enforcement counterparts, Congress has established the “exclusive means by which electronic surveillance ... may be conducted” in the United States. 18 U.S.C. § 2511(2)(f) (emphasis added). Congress did so to ensure that civil liberties are protected when the government carries out the vital task of combating terrorists and other foreign enemies. To that end, FISA expressly prohibits the President, except in certain narrowly defined circumstances, from authorizing domestic electronic surveillance for foreign intelligence purposes unless the Attorney General applies for, and the Foreign Intelligence Surveillance Court (“FISC”) (which FISA established expressly for this purpose) approves, a warrant application. *See id.*; 50 U.S.C. §§ 1802, 1804, 1811. The Attorney General has made no such application and obtained no such approval for the NSA’s surveillance activities. Those activities are thus flatly unlawful.

The NSA’s asserted justifications for disregarding FISA lack merit. Congress has never authorized the President to engage in warrantless electronic surveillance in the United States. The Authorization for the Use of Military Force (“AUMF”) enacted by Congress in the wake of the attacks on September 11, 2001, *see Pub. L. No. 107-40, 115 Stat. 224 (2001)*, neither explicitly nor implicitly supersedes FISA’s warrant requirements. FISA itself conclusively refutes this contention by providing that the statutorily mandated warrant requirements are the “exclusive” means for conducting such electronic surveillance, 18 U.S.C. § 2511(2)(f), and by making clear that even a formal declaration of war would not authorize the President to abrogate the statute, 50 U.S.C. § 1811. Moreover, because the Fourth Amendment requires a warrant for such surveillance and FISA establishes a special court with both the competence and the ability to rule expeditiously, there is no basis for invoking any exception to the warrant requirement here.

By flouting the statutory directives of Congress as well as the Fourth Amendment, the President’s actions raise grave separation of powers concerns, for they “serve[ ] only to condense power into a single branch of government.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion) (emphasis in original). This effort is particularly dangerous because it comes at the expense of both Congress’s and the judiciary’s powers to defend the individual liberties of Americans. “[A] state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.” *Id.* (emphasis added; internal citations omitted).

The issue is not whether the President has the ability to protect the public from terrorists by secretly surveilling them and their agents—for that is exactly what FISA allows. Indeed, FISA was directed at precisely the individuals allegedly targeted under this program: international terrorists. *See* 50 U.S.C. § 1801(b)(2)(C) (international terrorists are “agents ... of a foreign power” whose communications are subject to FISA). It provides ample authority for the Executive to act swiftly and secretly to obtain information about those terrorists, even in wartime. *See, e.g.,* 50 U.S.C. § 1811 (limited exemption for declared war). Rather, the issue is whether the President may disregard an Act of Congress that

safeguards the civil liberties of Americans on American soil.

Congress plainly has the authority to protect the civil liberties of Americans by requiring that the Executive seek a warrant when engaging in electronic surveillance of persons in the United States. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Supreme Court established that Congress can, even during time of war, regulate the “inherent power” of the President through duly enacted legislation. *Id.* at 584. That is precisely what FISA does. In authorizing warrantless electronic surveillance in direct violation of FISA, the President is acting not only with power that is at its “lowest ebb,” *see id.* at 637 (Jackson, J., concurring), he is acting in violation of his constitutional duty to enforce the law as enacted by Congress, *see id.* at 633 (“the power to execute the laws starts and ends with the laws Congress has enacted”), as well as the Fourth Amendment’s warrant requirement.

Thus, the district court should be affirmed.

#### ARGUMENT

##### I. WARRANTLESS ELECTRONIC SURVEILLANCE VIOLATES FISA.

###### A. FISA Is The “Exclusive” Means By Which The United States Government Can Engage In Electronic Surveillance In The United States For Foreign Intelligence Purposes.

The text of FISA could hardly be more clear. Section 201(b) of FISA amended Title III of the Omnibus Crime and Control and Safe Streets Act, 18 U.S.C. §§ 2510 *et seq.* (“Title III”), which generally prohibits electronic surveillance in the United States except pursuant to a warrant issued on probable cause to suspect criminal activity. *See* 18 U.S.C. §§ 2511(1), 2516. FISA amended Title III to explicitly except acquisition of international communications utilizing a means other than electronic surveillance. *See* Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, § 201(b), 92 Stat. 1783 (“FISA”) (codified at 18 U.S.C. § 2511(2)(f)). The amendment further provides that, along with Title III and the Stored Communications Act (“SCA”),<sup>FN1</sup> the “Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral and electronic communications may be conducted.” 18 U.S.C. § 2511(2)(f) (emphases added).

FN1. The SCA, codified in Chapter 121 of Title 18 of the U.S. Code, was part of the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848.

The statute thus forbids, in the clearest possible terms, electronic surveillance of persons in the United States, except that the Government may engage in such surveillance for foreign intelligence purposes if a warrant is obtained under FISA. Further underscoring the clarity of this prohibition, FISA repealed 18 U.S.C. § 2511(3), which previously had provided that “nothing ... shall limit the constitutional power of the President ... to obtain foreign intelligence information.” Act of June 19, 1968, Pub. L. No. 90-351, § 2511, 82 Stat. 197, 214; *see also* FISA, Pub. L. No. 95-511, § 201(c). The Supreme Court previously read § 2511(3) to “provide[] that the Act shall not be interpreted to limit or disturb such power as the President may have under the Constitution [to engage in electronic surveillance].” *United States v. United States District Court*, 407 U.S. 297, 303 (1972) (“*Keith*”).

FISA’s legislative history provides further confirmation that Congress’s dual purpose in enacting FISA was (1) to “provide a legislative authorization for ... electronic surveillance conducted within the United States for foreign intelligence purposes,” and (2) to “moot the debate over the existence or non-existence” of “any Presidential power to authorize warrantless surveillances in the United States.” H.R. Rep. No. 95-1283, pt. 1, at 24 (1978); *see also* S. Rep. No. 95-604, pt. 1, at 6-7 (1997), as reprinted in 1978 U.S.C.C.A.N. 3904, 3908. Thus, it is hardly surprising that every court to have considered the question has held that “the Foreign Intelligence Surveillance Act is intended to be exclusive in its domain.” *United States v. Torres*, 751 F.2d 875, 881 (7th Cir. 1984); *accord United States v. Andonian*, 735 F. Supp. 1469, 1474 (C.D. Cal. 1990), *aff’d*, 29 F.3d 634 (9th Cir. 1994) (unpublished table decision) (emphasis

added).

B. FISA Provides Flexible Tools For Obtaining Foreign Intelligence To Prevent And Combat Terrorism, Even In Wartime.

NSA asserts that the exigencies of combating terrorism and a state of war justify its disregard of FISA. That argument fails. FISA contemplates precisely such scenarios and provides the Executive with flexible tools to fight terrorism and conduct wartime actions effectively.

FISA expressly provides for “emergency situation[s]” where intelligence officials would not have time to seek a FISA warrant before engaging in certain electronic surveillance. See 50 U.S.C. § 1805(f)(1). It empowers the Attorney General to authorize such surveillance prior to requesting or obtaining a warrant from the FISC, as long as a request for such warrant was made within 72 hours of any such authorization. See 50 U.S.C. § 1805(f)(2). In fact, in response to the Administration’s request after the September 11, 2001 attacks, Congress increased the time allotted the Attorney General for submitting a warrant application from 24 to 72 hours in order to provide greater flexibility in combating terrorists. See Intelligence Authorization Act of 2002, Pub. L. No. 107-108, § 314(a)(2)(B), 115 Stat. 1402 (2001). Similarly, FISA provides that the Attorney General may authorize warrantless electronic surveillance for up to 15 days following a declaration of war. See 50 U.S.C. § 1811. This provision “allow[s] time for consideration of any amendment to this act that may be appropriate during a wartime emergency.” H.R. Conf. Rep. No. 95-1720, at 34 (1978), as reprinted in 1978 U.S.C.C.A.N. 4048, 4063.

Although the AUMF likely did not trigger this provision because it was not a formal declaration of war, the Administration still had the opportunity to seek any necessary amendments to FISA. Indeed, not long after the President first authorized the NSA’s surveillance, the Administration sought amendments to FISA in the USA PATRIOT Act, and Congress responded by substantially revising the statute in the wake of the September 11, 2001 attacks, see USA PATRIOT Act of 2001, Pub. L. No. 107-56, §§ 206-208, 214-218, 115 Stat. 272; and did so again in the Intelligence Authorization Act. The President could have made additional requests to Congress for amendments to FISA at any time in the last four years. The President simply chose to defy FISA instead.

II. CONGRESS DID NOT AUTHORIZE WARRANTLESS ELECTRONIC SURVEILLANCE BY THE PRESIDENT.

In the face of this exceptionally clear statute, the NSA contends that Congress authorized warrantless surveillance of persons in the United States when it enacted the AUMF. That contention is meritless.

The authorization in the AUMF provides, in full, [t]hat the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorists attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future act of international terrorism against the United States by such nations, organizations or persons.

AUMF, Pub. L. No. 107-40, § 2.

This language contains no reference to FISA, much less an express repeal of FISA’s warrant requirement. Nor is the AUMF an implied repeal or amendment. “The cardinal rule is that repeals by implication are not favored.” *Posadas v. National City Bank of N.Y.*, 296 U.S. 497, 503 (1936). An implied repeal will “only be found where provisions in two statutes are in ‘irreconcilable conflict,’ or where the latter Act covers the whole subject of the earlier one and ‘is clearly intended as a substitute.’” *Branch v. Smith*, 538 U.S. 254, 273 (2003) (emphasis added; citation omitted). Repeals by implication can be established only by “overwhelming evidence” of such an irreconcilable conflict. *J.E.M. Ag. Supplv. Inc. v. Pioneer Hi-Bred Int’l Inc.*, 534 U.S. 124, 137 (2001).

FISA and the AUMF are not in conflict, much less irreconcilably so. FISA requires the President to obtain a warrant when engaging in domestic electronic surveillance. The AUMF simply does not address that issue. It cannot reasonably be suggested that Congress *clearly expressed* with its *silence* in the AUMF the intention to repeal FISA. To the contrary, Congress has made perfectly clear its intention that FISA be *amended* in the event a future Congress desired to alter the statute's restrictions. As Justice Frankfurter noted in *Youngstown*, “[i]t is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem ... to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld.” 343 U.S. at 609 (Frankfurter, J., concurring).

The Supreme Court's recent decision in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), powerfully reinforces this point. There, the Court considered the propriety of the military commission convened by President Bush to try Hamdan, an enemy combatant detained at Guantanamo Bay. *Id.* at 2759. Hamdan contended that the President's actions violated the Uniform Code of Military Justice (“UCMJ”), 10 U.S.C. § 801, which sets forth the governing principles for military courts and conditions the President's authority to use military commissions. *Id.* at 2786. In particular, Article 21 of the UCMJ requires that the President comply with the American common law of war as well as “with the ‘rules and precepts of the law of nations,’” including the Geneva Conventions. *Id.* (quoting *Ex Parte Quirin*, 3 17 U.S. 1, 28 (1947)).

Although the Government argued that the AUMF authorized the President to invoke military commissions as he deems appropriate, the *Hamdan* Court disagreed, holding that “the military commission convened to try Hamdan lacks the power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions.” *Id.* at 2759. The Court found “nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ.” *Id.* at 2775. Whether or not the AUMF activated the President's war powers, it did not implicitly amend or repeal the UCMJ to authorize military commissions that would otherwise violate the UCMJ. *Id.* In the same way, nothing in the AUMF speaks to FISA. Accordingly, the AUMF does not authorize the President to engage in warrantless domestic electronic surveillance contrary to FISA.

*Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), is not to the contrary. In *Hamdi*, the Supreme Court considered whether the Government could detain as an enemy combatant an American citizen who was captured in a “foreign combat zone” in light of 18 U.S.C. § 4001 (a), which provides that “no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” *Hamdi*, 542 U.S. at 542. The Court concluded that the AUMF was one such “Act of Congress” because it authorized the detention of individuals who are “part of or supporting forces hostile to the United States or coalition partners in *Afghanistan* and who engaged in armed conflict against the United States there.” *Id.* at 516 (emphasis added; quotation marks omitted). But it did so based on the reasoning that “detention of individuals falling into the limited category we are considering ... is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate’ force Congress has authorized the President to use.” *Id.* at 518.

The Court was careful, however, to limit its ruling to “the narrow circumstances considered here,” *id.* at 519, namely, when an American citizen enemy combatant is detained in a “foreign battlefield,” *id.* at 522 n. 1, or a “foreign combat zone,” *id.* at 523 (emphasis in original). *Hamdi* contains no suggestion that Congress had authorized the Executive to engage in comparable activities on domestic soil where domestic law applies. To the contrary, the Court stressed that “a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.” *Id.* at 536.

Thus, there is no basis for concluding that the AUMF authorizes the NSA surveillance program at issue here.

### III. THE CONSTITUTION DOES NOT AUTHORIZE THE PRESIDENT TO DISREGARD FISA.

Similarly meritless is the NSA's contention that FISA would be unconstitutional if construed to limit the President's

authority to order warrantless surveillance of persons in the United States. In fact, the opposite is true. To the extent the NSA's program conflicts with FISA, it is the program that violates the Constitution.

In the Declaration of Independence, the Founders announced their determination to break from a tyrant king who "ha[d] affected to render the Military independent of and superior to the Civil power." The Declaration of Independence para. 14 (U.S. 1776). Our Constitution was established to end-- not enshrine--this kind of executive overreaching. See *Youngstown*, 343 U.S. at 641 (Jackson, J., concurring) ("The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image."). Indeed, by separating "governmental powers into three coordinate [d] Branches," the Framers designed a framework they considered "essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). The NSA surveillance program upends the balance among the three branches of government, and thereby threatens brock liberties the Constitution and the Bill of Rights are designed to protect.

That the President has unilaterally declared his actions to be in aid of the national defense is no excuse. In *Youngstown*, the Supreme Court explicitly rejected the notion that the President can rely on a national emergency or his position as Commander-in-Chief to ignore reasonable congressional restrictions on his exercise of power in the United States. The question in that case was "whether the President was acting within his constitutional power" when he directed the seizure of most of the Nation's steel mills. 343 U.S. at 582. The President asserted that he had "inherent authority" to do so and that "his action was necessary to avert a national catastrophe which would inevitably result from a stoppage of steel production, and that in meeting this grave emergency the President was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief." *Id.* at 582. When the President issued his order, the steel industry was in the midst of a nationwide labor dispute and the country was at war in Korea. *Id.* at 582-83. The President could not "rely on statutory authorization for this seizure" because the requirements for seizing property under any potentially applicable statute were not met, and because the very "use of the seizure technique to solve labor disputes" had been rejected by Congress. *Id.* at 585-86.

The Court held that the President violated the Constitution by seeking to exercise the Commander-in-Chief power in violation of a valid congressional enactment. As the Court explained, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Id.* at 587. Justice Jackson, in his now famous concurrence, further clarified the limitations on executive authority announced by the Court. Noting the "relativity" of the President's powers, Justice Jackson outlined the "legal consequences" of three separate exercises of executive authority: (1) "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate"; (2) "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain"; (3) "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* at 635-37 (Jackson, J., concurring); see *Dames & Moore v. Regan*, 453 U.S. 654, 668-69 (1981) (endorsing Jackson framework).

Analyzed in these terms, the President's power is at its lowest ebb here. In *Youngstown*, Congress had simply declined to enact an amendment that would have granted the President the power to seize the steel mills in a time of national emergency. 343 U.S. at 586. Here, Congress has *explicitly denied* the President the authority to engage in warrantless electronic surveillance of persons in the United States, even in a time of emergency, except pursuant to FISA's procedures. The Constitution provides, in mandatory language, that the President "*shall* take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3 (emphasis added). Thus, where, as here, the President is acting with power at its "lowest ebb," courts "can sustain exclusive Presidential control ... only by *disabling the Congress from acting upon the subject*." *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring) (emphasis added).

The Supreme Court's recent *Hamdan* decision powerfully reaffirmed these principles in holding that the President had

no authority to create military tribunals that violate statutory limitations Congress had imposed in the UCMJ. 126 S. Ct. at 2786. The Court noted that “[w]hether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of [his] own war powers, placed on his powers.” *Id.* at 2774 n.23 (citing Youngstown, 343 U.S. at 637). That holding reinforced the limits on presidential power set forth in *Youngstown*. Indeed, the “[c]oncentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution’s three-part system is designed to avoid.” *Id.* at 2800 (Kennedy, J. concurring).

In the present case, there are two related reasons why the Constitution does not disable the Congress from acting to safeguard the privacy rights and civil liberties of Americans and others in the United States. *First*, Congress has acted in an area squarely within its constitutionally assigned sphere--the protection of persons within the United States. *Second*, Congress has acted to ensure that the judiciary is able to carry out its constitutionally assigned responsibility under the Fourth Amendment.

#### A. The Constitution Does Not Disable Congress From Acting To Protect The Civil Liberties Of Americans In The United States.

Congress plainly has the authority to safeguard the rights of persons within the United States against arbitrary executive action. To be sure, foreign intelligence surveillance involves both domestic and international aspects, and applies in both peacetime and wartime. But the mere fact that a law with a domestic focus also relates to international relations or the military does not grant the President a right unilaterally to abrogate the law. In order for Congress to be “disabled” from acting, the asserted authority of the President must be *exclusive*. Even in the areas of foreign affairs and the military, executive power is not absolute. Indeed, Congress’s authority to enact FISA is especially clear because FISA’s focus is on the protection of the privacy and civil liberties of Americans in the United States--where legislative power is at its zenith. As the Supreme Court recently held, “[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.” Hamdi, 542 U.S. at 536 (emphasis added). Implementation of the constitutional protection against unreasonable searches and seizures, even in wartime, is likewise well within Congress’s authority.

To grant the President the power to act outside of FISA, except in the rarest of circumstances, would be extremely dangerous. It would permit the President and the military to ignore *any* statute enacted to protect individual rights simply by asserting that such action is necessary to pursue al Qaeda, another terrorist group, or another foreign enemy. The authority is potentially infinite because there is no foreseeable end to the present campaign against terrorism. And it is limitless in scope. Although the Administration has asserted that it has limited the secret NSA program only to communications where one party is abroad, and only where there is a basis to believe there is a link to a particular terrorist group (al Qaeda), its claimed “inherent authority” is not so limited. Because it depends on the President’s unreviewable assertion that a duly-enacted statute impedes efforts to combat international terrorism--even where the statute seeks to protect Americans in this country--the authority would permit him to conduct surveillance of domestic communications based merely on an NSA operative’s determination that the communication has some link (however indirect) with terrorism (however the President defines it). Our Constitution does not permit such a disregard for the roles of the other two branches of our government.

#### B. The Executive Cannot Disregard The Warrant Procedure Established By Congress To Implement Americans’ Fourth Amendment Rights.

Contrary to NSA’s contention, the doctrine of “constitutional avoidance” counsels in favor of, not against, upholding FISA. That is because the Fourth Amendment independently prohibits the Executive from disregarding the warrant requirement as implemented by statute to protect the right of Americans to be free from intrusive and potentially arbitrary searches and seizures. FISA “embodies a legislative judgment that court orders and other procedural safeguards are necessary to insure that electronic surveillance by the U.S. Government within this country conforms to the

fundamental principles of the fourth amendment.” *S. Rep. No. 95-701, at 13 (1978)*, as reprinted in 1978 U.S.C.C.A.N. 3973, 3982. Congress’s creation of the FISC overcomes any perceived lack of judicial competence, swiftness, and secrecy that might have previously deterred some courts from enforcing the Fourth Amendment’s warrant requirement in the area of foreign intelligence surveillance. Because of FISA and the judicial process it creates, there is no cause to recognize an exception to that warrant requirement for the NSA program, and the Fourth Amendment provides yet another basis to uphold Congress’s power to protect the privacy rights of Americans and others in this country.

The NSA contends that the “state secrets” privilege prevents this Court from determining whether the NSA surveillance program violates the Fourth Amendment. That is incorrect. The Government has already disclosed sufficient facts about the NSA program for this Court to determine that it violates the Fourth Amendment, even if the state secrets privilege otherwise applies. Specifically, the Government has admitted that the NSA conducts warrantless electronic surveillance of persons within the United States covered by the requirements of FISA. Because (as will be shown) none of the narrow exceptions to the Fourth Amendment’s warrant requirement applies here, the publicly available facts are sufficient to establish that the NSA program violates the Fourth Amendment.

“The basic purpose of th[e] [Fourth] Amendment ... is to safeguard the privacy and security of individuals against arbitrary invasion by governmental officials.” *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). It thus forbids “unreasonable searches and seizures,” and provides that “no Warrants shall issue, but upon probable cause.” *U.S. Const. amend IV*. The warrant requirement is a separate restriction, in addition to the requirement that all searches must be reasonable. *See Keith*, 407 U.S. at 315. Electronic surveillance is presumptively subject to that warrant requirement. With only a few exceptions, such surveillance “conducted outside the judicial process, without prior approval by judge or magistrate [is] *per se* unreasonable.” *Katz v. United States*, 389 U.S. 347, 357 (1967) (emphasis added). Before FISA, the Court had not decided whether there should be an exception to the warrant requirement for foreign intelligence (as opposed to domestic) electronic surveillance. But the Court made clear that such surveillance, while a necessary tool, is not “a welcome development—even when employed with restraint and under judicial supervision” because “[t]here is, understandably, a deep-seated uneasiness and apprehension that this capability will be used to intrude upon cherished privacy of law-abiding citizens.” *Keith*, 407 U.S. at 312. Thus, “the broad and unsuspected governmental incursions into conversational privacy which electronic surveillance entails necessitate the application of Fourth Amendment safeguards.” *Id.* at 313 (footnote omitted) “Official surveillance, whether its purpose be criminal investigation or ongoing intelligence gathering, risks infringement of constitutionally protected privacy ...” *Id.* at 320.

Through the warrant requirement, “the Constitution requires that the deliberate, impartial judgment of a judicial officer ... be interposed” between the citizen and the government. *Katz*, 389 U.S. at 357 (internal quotation marks omitted; alteration in original). The Warrant Clause “is not an inconvenience to be somehow weighed against the claims of police efficiency.” *Keith*, 407 U.S. at 315. Rather, it is “an important working part of our machinery of government, operating as a matter of course to check the ‘well-intentioned but mistakenly over-zealous executive officers.’” *Id.* at 316 (citation omitted). The central protection of the Fourth Amendment is the “neutral and detached magistrate.” *Id.* (citation omitted). The Fourth Amendment thus “contemplates a *prior judicial* judgment, not the risk that executive discretion may be reasonably exercised.” *Id.* at 317 (emphasis added; footnote omitted).

The Supreme Court has recognized certain limited and specifically enumerated exceptions to the warrant requirement. *Katz*, 389 U.S. at 356-57. In *Keith*, however, the Court expressly rejected “the Government’s argument that internal security matters are too subtle and complex for judicial evaluation” or that “prior judicial approval will fracture the secrecy essential to official intelligence gathering.” 407 U.S. at 320. Rather, the Court held that the President’s constitutional role in ensuring domestic security “must be exercised in a manner compatible with the Fourth Amendment,” which “requires an appropriate prior warrant procedure.” *Id.* The Court was concerned that “unreviewed executive discretion may yield too readily to pressures to obtain [intelligence information] and overlook potential invasions of privacy and protected speech.” *Id.* at 317. As the Court explained, “[s]ecurity surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing

nature of the intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent.” *Id.* at 320.

To be sure, *Keith* left open whether there might be a basis for an exception to the warrant requirement where electronic surveillance is conducted of foreign powers or their agents for foreign intelligence purposes. Since then, the Supreme Court has not taken up the issue, and the lower courts divided on the question. Courts directly addressing the question recognized such an exception in limited circumstances. See *United States v. Truong*, 629 F.2d 908, 916 (4th Cir. 1980); *United States v. Butenko*, 494 F.2d 593 (3d Cir. 1974) (en banc); *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973). But in *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (en banc), a plurality of the D.C. Circuit rejected the notion that electronic surveillance for foreign intelligence purposes can be conducted without a warrant.

The very existence of FISA, and the judicial procedures it establishes, “moot the debate,” H.R. Rep. No. 95-1283, pt. 1, at 24, by demonstrating conclusively that there is no basis for an exception to the warrant requirement in these circumstances, and therefore no inherent authority in the Executive to disregard Congress’s warrant procedures. Any exception may be justified only by “compelling” reasons, *Mincey v. Arizona*, 437 U.S. 385, 394 (1978), and no such reasons exist after FISA. The pre-FISA cases finding an exception are simply inapplicable in a post-FISA world. Those cases balanced the President’s interest in protecting the national security from foreign threats against the impediment of seeking prior judicial approval for electronic surveillance from a district court unfamiliar with and possibly unsuited to foreign intelligence issues. See, e.g., *Truong*, 629 F.2d at 912-916, *Butenko*, 494 F.2d at 605. But because these cases involved surveillance conducted before FISA, they did not weigh the requirement that the Executive go to a specialized court with streamlined procedures, and strict secrecy, to seek a warrant before engaging in such electronic surveillance. In fact, Congress eliminated the very concerns the pre-FISA courts cited to justify excusing the President from having to seek prior judicial authorization for foreign intelligence surveillance were addressed and eliminated by Congress when it created the FISC.

Indeed, the need to apply the warrant requirement to the electronic surveillance involved in the NSA program is particularly pronounced, because the targets of secret foreign intelligence surveillance will seldom, if ever, become aware of the surveillance unless they are subsequently indicted for a criminal offense. Thus, judicial review of the surveillance will rarely occur. In the domestic criminal context, the target must be given notice of the search upon the expiration of an order authorizing electronic surveillance. See 18 U.S.C. § 2518(8)(d). As the Supreme Court has noted, these notice procedures “satisfy constitutional requirements.” See *United States v. Donovan*, 429 U.S. 413, 429 n. 19 (1977) (citing, *inter alia*, *Katz*, 389 U.S. at 355-56). In contrast, the only privacy protections that targets of secret foreign surveillance are afforded from executive overreaching are FISA’s minimization procedures and the judicial guardianship of the FISC. See 50 U.S.C. § 1805(a)(4); 50 U.S.C. § 1801(h); *United States v. Belfield*, 692 F.2d 141, 148 (D.C. Cir. 1982) (“In FISA the privacy rights of individuals are ensured not through mandatory disclosure [of surveillance logs], but through its provisions for in-depth oversight of FISA surveillance by all three branches of government and by a statutory scheme that to a large degree centers on an expanded conception of minimization that differs from that which governs law-enforcement surveillance”). The NSA’s program eliminates both of these safeguards and, instead, substitutes the discretion of NSA operatives. It is therefore critical that such secret surveillance be subject to a warrant requirement so that a court can assure the existence of probable cause, the reasonableness of these searches, and that minimization safeguards are implemented. Moreover, the disclosure that under the NSA program surveillance may be initiated without a judicial finding of probable cause further demonstrates that, irrespective of the state secrets privilege, sufficient facts are available to determine that the program violates the Fourth Amendment.

Additionally, the fact that, absent a criminal prosecution, foreign intelligence searches are permanently secret makes them different from the “special needs” cases cited by NSA as support for warrantless searches. In “special needs situations the person who is searched knows that he has been searched and knows the information that may have been disclosed. See, e.g., *Vernonia School District 47 J v. Acton*, 515 U.S. 646, 664-65 (1995) (upholding drug-testing for students participating in school athletics program); *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444, 449-55 (1990) (upholding checkpoint to screen for drunk drivers). The person, therefore, has the ability to challenge the search and vindicate his Fourth Amendment rights. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976) (finding that

"[r]outine checkpoint stops" were reasonable because "a claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review.").

Furthermore, individuals subjected to "special needs" searches may use other methods to remedy negative consequences of the search, such as seeking to expunge or clarify the seized information. Individuals subjected to secret electronic surveillance have no such opportunity, see 5 U.S.C. § 552a(k)(1) (exempting properly classified material from disclosure under the Privacy Act of 1974), even though electronic surveillance reveals significantly more personal information than special needs searches, and that information may be retained in various government files and used to the detriment of the person searched in various ways.

In considering whether there is an exception to the presumptive warrant requirement, it is proper for this Court to look to Congress's judgment to determine that current circumstances compel no such exception. *Cf. United States v. Watson*, 423 U.S. 411,415 (1976). Indeed, the Supreme Court encouraged Congress to impose procedures for obtaining a warrant for electronic surveillance for domestic security threats. See *Keith*, 407 U.S. at 324 (requiring "prior judicial approval ... of domestic security surveillance ... as the Congress may prescribe").

Thus, all the factors potentially counseling against requiring the President to seek prior judicial approval for foreign intelligence surveillance by a federal district court are absent when the President can seek such approval from the FISC. By contrast, the concern that the Executive can and will infringe, even inadvertently, on the privacy and free speech rights of Americans is ever constant. The potential for abuse of civil liberties is particularly acute in the realm of foreign intelligence gathering because the perceived stakes are higher, the Executive acts with the utmost secrecy, and foreign intelligence officers are less accustomed than law enforcement officers to the privacy concerns presented by the Fourth Amendment. The warrant requirement exists precisely so that neutral and detached magistrates will ensure that executive officers in fact possess probable cause for a contemplated search and that the search is appropriately limited. The NSA's secret, warrantless program lacks these critical protections. And because of the secrecy of the program, there is no way for anyone to know if probable cause exists and the search is reasonable.

Not only are the very persons who may be impinging on the privacy rights of Americans unilaterally judging the reasonableness of their own actions, they have, until recently, done so without any public knowledge or scrutiny of their activities. But even assuming for the sake of argument that these intelligence officers are safeguarding personal liberties with the greatest of care, the Constitution still requires prior review of their judgments by a disinterested magistrate. See *Katz*, 389 U.S. at 356 ("It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer."). "[A] governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizens' private ... conversation[s]." *Keith*, 407 U.S. at 316. When the disinterested judgment of the neutral magistrate is eliminated, all that is left is "unreviewed executive discretion." *Id.* at 317.

The Fourth Amendment thus undergirds and reinforces FISA's requirement that the government obtain a warrant in order to engage in foreign intelligence surveillance of persons in the United States. Any concerns potentially counseling against enforcing the warrant requirement in the foreign intelligence realm have been absent for the better part of thirty years, and the threat to individual liberties by an unchecked Executive is, if anything, magnified in the current environment. Accordingly, there is no basis for determining that the President has inherent authority to disregard the warrant requirement enacted by Congress to safeguard the Fourth Amendment rights of persons in the United States.

#### CONCLUSION

The district court should be affirmed.

AMERICAN CIVIL LIBERTIES UNION, et al., Plaintiffs--Appellees/Cross-Appellants, v. NATIONAL SECURITY AGENCY, et al., Defendants--Appellants/Cross-Appellees.  
2006 WL 4055623 (C.A.6) (Appellate Brief)

## SUBMISSIONS FOR THE RECORD



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February 28, 2010

The Honorable Patrick Leahy  
 Chairman  
 United States Senate Committee on the Judiciary  
 224 Dirksen Senate Office Building  
 Washington, D.C. 20510

The Honorable Charles Grassley  
 Ranking Member  
 United States Senate Committee on the Judiciary  
 224 Dirksen Senate Office Building  
 Washington, D.C. 20510

Re: Nomination of Virginia A. Seitz to be Assistant Attorney General,  
 Office of Legal Counsel

Dear Chairman Leahy and Ranking Member Grassley:

I write to give my unqualified support to the nomination of Virginia Seitz to serve as Assistant Attorney General for the Office of Legal Counsel ("OLC") at the Department of Justice. I was fortunate to serve as a Deputy Assistant Attorney General in the Civil Division of the Department of Justice from 2006 to 2009. I also helped coordinate the letters by former law clerks and prominent legal practitioners provided to your Committee in support of the nomination of the Honorable Samuel A. Alito, Jr. to the Supreme Court. I have worked with the nominee as a colleague in private law firm practice for a number of years, both prior to my work at the Department of Justice and after returning to private practice.

Although one of the smallest components within the Department, OLC is one of the most important. OLC has responsibility for providing legal advice to the President and to the individual departments and agencies within the Executive Branch. In that capacity, the Assistant Attorney General that oversees OLC has ultimate responsibility for resolving legal disputes that can, and often do, arise between those departments and agencies. Lawyers at the Department of Justice and the federal department and agencies routinely look to OLC to provide advice on the most difficult and complex legal issues affecting their mission.



The Honorable Patrick Leahy  
The Honorable Charles Grassley  
U.S. Senate Committee on the Judiciary  
February 28, 2011  
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I believe Virginia is ideally suited to this role. She is, in the best sense of the term, a "lawyer's lawyer." Clients of all types – ranging from large "Fortune 100" companies to non-profit trade associations – routinely seek the nominee's legal advice on their most difficult and challenging matters. So do the lawyers at my firm. Indeed, on numerous occasions, I have dropped by Virginia's office to get advice on legal issues that have arisen on matters that I am handling. In each instance, I benefited enormously from having done so.

The reasons why Virginia's counsel is so sought after are obvious to anyone that has had the privilege of working with her. She not only has a deep and sophisticated understanding of numerous areas of the law, but she is able to communicate that understanding in a clear and concise manner. And her enormous intellect is reinforced and amplified by her rigorous approach to analyzing legal issues. She considers seriously all aspects of a legal problem, never diminishing or slighting opposing views. She researches issues thoroughly and thoughtfully. In my experience, she never locks herself into a particular position, but is always willing to reevaluate her thinking to accommodate new facts or arguments. She is a graceful writer and a skilled oral advocate.

I have the utmost confidence that Virginia would carry out her responsibilities in the best traditions of the office. Her reputation for personal and intellectual integrity is well-deserved. In the years I have known her, she has not once displayed any partisan tendencies. There is no doubt in my mind that in making the many tough calls required as Assistant Attorney General, she would make those decisions based on a thoughtful, fair and considered legal analysis, and never for personal or political expediency.

In sum, I commend the President for his nomination of Virginia Seitz to be Assistant Attorney General for OLC. I appreciate the opportunity to express my views, and would be happy to elaborate upon them in any way if that would be of assistance to you, to the Committee, or to its staff.

Sincerely,

A handwritten signature in cursive script that reads "C. Fred Beckner III".

C. Frederick Beckner III



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February 3, 2011

The Honorable Patrick J. Leahy  
 Chairman  
 United States Senate Committee on the Judiciary  
 224 Dirksen Senate Office Building  
 Washington, D.C. 20510

The Honorable Charles E. Grassley  
 Ranking Member  
 United States Senate Committee on the Judiciary  
 224 Dirksen Senate Office Building  
 Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Grassley:

I am writing to endorse the nomination of Virginia Seitz to serve as Assistant Attorney General for the Office of Legal Counsel.

Having served in the George W. Bush White House Counsel's Office, I have worked closely with OLC on many issues and understand well the qualifications and personal qualities that the Assistant Attorney General in charge of that important office should possess. Having worked with Virginia as law partners and friends at Sidley Austin over many years, I know that she possesses all of them.

Above all else, Virginia is a lawyer's lawyer, driving to reach the right answer under the law. She is careful, smart, and principled. I have never seen her legal judgment distorted by her political or policy wishes, nor have I ever observed an instance in which her legal acumen was anything short of outstanding. She is also a person of great personal integrity and strength, and I have no doubt that she has the stature, self-confidence, and substantive legal ability to stoutly defend correct interpretations of federal law within the executive branch, notwithstanding the



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The Honorable Charles E. Grassley  
February 3, 2011  
Page 2

enormous pressures that are sometimes brought to bear on OLC. I know she would resign rather than bow to political pressure to alter a sincerely held and well considered legal judgment.

In my opinion, President Obama has made an outstanding choice to lead this office, and one that should command broad bipartisan support. Whatever the boundary of deference individual members of the Committee believe should be afforded to a President's executive branch appointments, Virginia's nomination should fall comfortably within it. She is not a Republican, and she is not a conservative. But she is a person in whom people of widely varying political philosophies, including me, have great confidence. As a conservative Republican, I have no discomfort at all with the idea of Virginia being vested with the powers belonging to the OLC AAG. If confirmed, she will perform the duties of that office diligently, and in the right way. She will be guided by law and the institutional interests of the executive branch, and not by any desire to curry favor with more political actors within the government. I urge the Committee to vote for her swift confirmation.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Bradford A. Berenson".

Bradford A. Berenson

2/3/11 7:2

Senator Thomas Carper

Introductory Remarks for Virginia Seitz

I have the great honor and pleasure of introducing Virginia Seitz, the President's nominee to serve as Assistant Attorney General for the Office of Legal Counsel at the U.S. Justice Department. The President has made a wise choice in nominating Ms. Seitz for this position.

Our country is fortunate that someone with her outstanding credentials has stepped forward to do this important work. Ms. Seitz's education, background, and experience are superbly suited for this position.

As a student at Duke University, Virginia Seitz graduated summa cum laude, with a bachelor of arts degree, after which she was awarded a Rhodes Scholarship to study at Oxford University. She later earned her law degree from the University at Buffalo, graduating first in her class.

After law school, Ms. Seitz clerked for Judge Harry T. Edwards of the D.C. Circuit Court of Appeals, and for U.S. Supreme Court Justice William Brennan. Currently, Ms. Seitz is a partner at the law firm of Sidley Austin in Washington, D.C. She is one of the nation's leading appellate litigators. With over 20 years of litigation experience, Virginia Seitz has prepared hundreds of briefs and petitions for federal courts, and more than 100 briefs for the Supreme Court alone.

Aside from her professional experience, Virginia Seitz is a person of great character. She is joined today by several members of her family, including her husband, Roy McLeese; her son, Roy; and one of her three brothers, C.J. Seitz, Jr.

Virginia is proud of her family's deep roots in Delaware. Her father, C.J. Seitz, attended to the University of Delaware and then obtained his law degree from the University of Virginia.

C.J. Seitz served as Vice Chancellor, and then Chancellor, of the Delaware Court of Chancery, earning distinction for his decisions in crucial civil rights cases. After 20 years on the Delaware bench, C.J. Seitz joined the Third Circuit Court of Appeals. As Virginia has said, he was a "great man," and I know that he is proud of his daughter today.

And I, too, am proud to have the privilege of introducing someone who has done, and who will continue to do, great service for the nation. With her legal acumen, her tireless work ethic, and her experience as a federal litigator, Virginia Seitz is more than qualified to serve as Assistant Attorney General for the Office of Legal Counsel. I urge my colleagues, in this Committee and in the Senate as whole, to move quickly on her confirmation.

Senator Thomas Carper

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February 10, 2011

The Honorable Patrick J. Leahy  
Chairman  
United States Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

The Honorable Charles E. Grassley  
Ranking Member  
United States Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Re: Nomination of Virginia A. Seitz

Dear Chairman Leahy and Ranking Member Grassley:

I write to enthusiastically support the President's nomination of Virginia Seitz as Assistant Attorney General for the Office of Legal Counsel.

While I obviously do not know Virginia as well as her colleagues at Sidley, and while we approach issues from a different ideological perspective, I am quite comfortable in enthusiastically recommending her for this important and sensitive legal position. As an OLC alum (I was Deputy Assistant Attorney General at OLC in the Reagan Administration), I know that the key qualifications for this position are the ability to honestly and intelligently analyze complex legal questions and, equally important, to provide candid advice notwithstanding that OLC's work will inevitably engender policy-based criticism from both within and outside the Administration. Although, again, I have not directly worked with Ms. Seitz, my exposure to her in more informal settings—moot courts and the like—convinces me that she is a thoughtful and well-prepared attorney who grounds her opinions on the legal merits, rather than extraneous concerns. She understands the difference between law and policy.

I am also familiar with Virginia's reputation in the District of Columbia legal community, particularly among appellate practitioners, where she is universally regarded as an accomplished, skillful lawyer. More specifically, a number of lawyers whose judgment I greatly respect and who approach the law from my "conservative" perspective—such as Peter Keisler and Glen Nager—speak glowingly of Ms. Seitz's acumen and integrity, especially in contentious and difficult circumstances.

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JONES DAY

The Honorable Patrick J. Leahy  
The Honorable Charles E. Grassley  
February 10, 2011  
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For these reasons, I am fully confident that Virginia will capably and carefully interpret the myriad of contentious legal issues at OLC in a manner that is faithful to the law. In candor, I do not have the same view of some of the Administration's nominees for OLC or other important legal positions, and that is my final pragmatic—indeed, selfish—reason for vigorously endorsing Ms. Seitz's nomination. OLC plainly needs leadership in these challenging times and Ms. Seitz will better carry out its important functions, particularly those relating to our national security, than any other person that this Administration would nominate for the job. Consequently, for those, like me, who approach constitutional issues from a different perspective than the current Justice Department, Ms. Seitz will undoubtedly be the best candidate for a position that plainly should be filled in the near future.

Thank you in advance for your consideration.

Sincerely,



Michael A. Carvin

February 1, 2011

The Honorable Patrick J. Leahy, Chairman  
Senate Committee on the Judiciary  
United States Senate  
433 Russell Senate Office Building  
Washington, DC 20510

Senator Chuck Grassley, Ranking Member  
Senate Committee on the Judiciary  
United States Senate  
135 Hart Senate Office Building  
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Grassley:

I write in support of Virginia Seitz's nomination as Assistant Attorney General for the Office of Legal Counsel. I have known Virginia for over 8 years. Over several of those years, I worked closely with her on several legal cases while I was a lawyer in her law firm, Sidley Austin LLP. During all of this time, I have known Virginia to be a thoughtful, conscientious, and fair-minded lawyer. She would make an excellent head of the Office of Legal Counsel.

I support Virginia's nomination despite the fact that she and I do not share the same political persuasion. I am a Republican, and I have spent many years of my legal career working for Republican members of the federal judiciary and the United States Senate. I support Virginia because I know from firsthand experience that she is not only a very talented lawyer, but also someone who is willing to listen to and work with people who do not share her political views. I know of few people who are suited to discharge the duties of the Office of Legal Counsel in a more responsible and professional manner.

The Assistant Attorney General who runs the Office of Legal Counsel is one of the most important positions in the Department of Justice. The job should go to someone who has the maturity, experience, and professionalism to put the interests of the American people above partisan politics. I know from my many years as her friend and colleague that Virginia is someone who will serve the country in this manner.

Sincerely,



Brian Fitzpatrick

Law clerk, The Honorable Antonin Scalia, 2001-02  
Special Counsel for Supreme Court Nominations,  
The Honorable John Cornyn, 2005-2006  
Associate Professor of Law  
Phone (615) 322-4032  
Fax (615) 322-6631  
[brian.fitzpatrick@law.vanderbilt.edu](mailto:brian.fitzpatrick@law.vanderbilt.edu)

The General Counsels of 30 Businesses

March 28, 2011

By Hand and Email

Hon. Patrick J. Leahy, Chairman  
United States Senate  
Committee on the Judiciary  
473 Russell Senate Office Building  
Washington, DC 20510

Hon. Chuck Grassley, Ranking Member  
United States Senate  
Committee on the Judiciary  
135 Hart Senate Office Building  
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Grassley:

We write to express our support for the nomination of Donald B. Verrilli, Jr., to be Solicitor General of the United States. We are General Counsels of a broad spectrum of American businesses. Everything we know about Mr. Verrilli, whether from direct contact or from seeing his work, indicates that he would be a superb Solicitor General.

The jobs, goods and services that make up our economy all depend on robust investment by business. That investment in turn depends vitally on the existence of a regular, stable and rational system of law. Outside of the courts themselves, the Office of the Solicitor General is the most important and visible protector of our nation's legal standards. Mr. Verrilli's career reflects a lifelong commitment to, and an exceptional ability to preserve and bolster, those standards.

Mr. Verrilli has broad experience with the legal issues that arise for businesses. He has represented large and small businesses, and he has litigated for and against businesses. In his recent government service, Mr. Verrilli has had occasion to meet with various businesses affected by a number of significant legal issues. In these settings, he has consistently displayed wide and deep legal knowledge, acute analysis of the issues at hand, genuine appreciation for the real interests on all sides, intense focus on reason as the basis for advocacy and decision-making, and unfailing civility in dealing with everyone. He is a model of the talents and manner that our legal system, at its best, seeks to foster and spread.

We urge the Committee's swift and affirmative evaluation of Mr. Verrilli's nomination.

Hon. Chairman Leahy and Hon. Ranking Member Grassley  
March 28, 2011  
Page 2 of 3

Respectfully,

CG Appleby  
Executive Vice President and General  
Counsel  
Booz Allen Hamilton

Michael C. Bailey  
Senior Vice President and General  
Counsel  
Bechtel Group, Inc.

Arthur R. Block  
Senior Vice President, General Counsel  
and Secretary  
Comcast Corporation

Darryl M. Bradford  
Senior Vice President and General  
Counsel  
Exelon Corporation

Alan N. Braverman  
Senior Executive Vice President,  
General Counsel and Secretary  
The Walt Disney Company

Louis J. Briskman  
Executive Vice President and General  
Counsel  
CBS Corporation

Mark Chandler  
Senior Vice President, General Counsel  
and Secretary  
Cisco Systems, Inc.

Sheila C. Cheston  
Corporate Vice President and General  
Counsel  
Northrop Grumman Corporation

Richard Cotton  
Executive Vice President and General  
Counsel  
NBCUniversal LLC

Brackett B. Denniston III  
Senior Vice President and General  
Counsel  
GE Corporation

David Ellen  
Executive Vice President and General  
Counsel  
Cablevision Systems Corporation

Michael D. Fricklas  
Executive Vice President, General  
Counsel and Secretary  
Viacom Inc.

Marc Gary  
Executive Vice President and General  
Counsel  
Fidelity Investments/FMR LLC

Jeffrey J. Gearhart  
Executive Vice President and General  
Counsel  
Wal-Mart Stores, Inc.

Julie Jacobs  
Executive Vice President, General  
Counsel and Corporate Secretary  
AOL Inc.

Frank R. Jimenez  
Vice President and General Counsel  
ITT Corporation

David G. Leitch  
General Counsel and Group Vice  
President  
Ford Motor Company

Sandra Leung  
General Counsel and Corporate  
Secretary  
Bristol-Myers Squibb Company

Hon. Chairman Leahy and Hon. Ranking Member Grassley  
March 28, 2011  
Page 3 of 3

A. Douglas Melamed  
Senior Vice President and General  
Counsel  
Intel Corporation

Randal S. Milch  
Executive Vice President and General  
Counsel  
Verizon Communications Inc.

R. Hewitt Pate  
Vice President and General Counsel  
Chevron Corporation

Carol Ann Petren  
Executive Vice President and General  
Counsel  
CIGNA Corporation

John A. Rogovin  
Executive Vice President and General  
Counsel  
Warner Bros. Entertainment Inc.

Edward A. Ryan  
Executive Vice President and General  
Counsel  
Marriott International, Inc.

Thomas L. Sager  
Senior Vice President and General  
Counsel  
E. I. du Pont de Nemours and Company

Nicole Seligman  
Executive Vice President and General  
Counsel  
Sony Corporation and Sony Corporation  
of America

Jane Sherburne  
Senior Executive Vice President and  
General Counsel  
The Bank of New York Mellon  
Corporation

Bradford L. Smith  
General Counsel and Senior Vice  
President, Legal and Corporate Affairs  
Microsoft Corporation

Daniel E. Troy  
Senior Vice President and General  
Counsel  
GlaxoSmithKline plc

Kent Walker  
Senior Vice President and General  
Counsel  
Google Inc.

STATEMENT FOR THE RECORD  
SENATOR KIRSTEN E. GILLIBRAND  
March 30, 2011

**Statement on the Nomination of Denise O'Donnell**

Mr. Chairman, I am pleased to strongly support Denise E. O'Donnell, President Obama's nominee to serve as the Director of the Bureau of Justice Assistance in Department of Justice's Office of Justice Programs. Denise is a highly skilled and talented attorney, an accomplished New Yorker, and a dedicated public servant. I applaud President Obama for this excellent selection.

Ms. O'Donnell's distinguished career as a United States Attorney and a Public Safety Official demonstrates her commitment to justice and public service. Her background as both a lawyer and a professional social worker affords her a unique combination of skills and perspectives to assess the needs facing the criminal justice sector. As Commissioner of the New York State Division of Criminal Justice Services, she oversaw efforts to improve public safety and the criminal justice sector in one of the most geographically and demographically diverse states in the nation, and has a strong appreciation for the unique needs of urban, rural and suburban communities.

A native of Buffalo, New York, Ms. O'Donnell was the first person in her family to graduate from college. She earned a master's degree in social work from the State University of New York at Buffalo, and spent a decade working in the areas of child abuse and neglect, substance abuse, and community mental health issues. Denise went on to attend law school at SUNY Buffalo, where she graduated *summa cum laude*, and worked as a legal assistant for the Citizens Council on Human Relations on the landmark Buffalo school desegregation case.

Ms. O'Donnell was the first woman to hold the position of United States Attorney in upstate New York. As U.S. Attorney, she worked on the nation-wide investigation that developed crucial evidence against Timothy McVeigh, ultimately leading to his conviction for orchestrating the 1995 bombing of the Oklahoma City federal building. Denise also helped establish a program to prevent housing discrimination, and was instrumental in establishing the first Hate Crimes Task Force in the western New York.

She has been recognized for her extraordinary service through induction into the Western New York Women's Hall of Fame, and received the New York State Bar Association's Ruth G. Shapiro Award and the State Bar's Award for Excellence in Public Service.

I am confident that Denise E. O'Donnell will be an extraordinary Director of the Bureau of Justice Assistance and will bring to the Department of Justice the passion, intelligence, and commitment to service that has been vital to her past success. I am honored to enthusiastically support her candidacy, and I urge all of my colleagues to support her confirmation.

**Statement of Senator Chuck Grassley  
Ranking Member  
Committee on the Judiciary  
United States Senate**

**Before the Committee on the Judiciary**

**On the Nominations of:**

*Donald B. Verrilli, Jr., to be Solicitor General of the United States*

*Virginia A. Seitz, to be an Assistant Attorney General, Office of Legal Counsel,  
Department of Justice*

*Denise E. O'Donnell, to be Director of the Bureau of Justice Assistance, Department of Justice*

**March 30, 2011**

Mr. Chairman:

On today's agenda we have three nominations for important positions in the United States Department of Justice. I join you in welcoming the nominees as well as their families and friends.

The task of the Office of the Solicitor General is to supervise and conduct government litigation in the Supreme Court of the United States. Virtually all such litigation is channeled through the Office of the Solicitor General and is actively

conducted by the Office. The United States is involved in approximately two-thirds of all the cases the Supreme Court decides on the merits each year. So this is a very important position. I would note Mr. Verrilli is nominated to be Solicitor General of the United States. He is not the President's Solicitor General, nor the SG of the Department of Justice. The Solicitor General must be an independent voice within the administration. That means the courage and willingness to defend all of the laws and Constitution of the United States, regardless of the politics of the moment. This is particularly important, given the President's announcement that he will not defend the Defense of Marriage Act.

Likewise, the Assistant Attorney General heading the Office of Legal Counsel must also be an independent and non-political voice within the administration. I will not describe all of the duties of this office, but would highlight a few. By delegation from the Attorney General, this official provides authoritative legal advice to the President and all the

Executive Branch agencies. The Office of Legal Counsel drafts legal opinions of the Attorney General and also provides its own written opinions and oral advice in response to requests from the Counsel to the President, the various agencies of the Executive Branch, and offices within the Department. The Office also is responsible for providing legal advice to the Executive Branch on all constitutional questions and reviewing pending legislation for constitutionality. In performing these duties, the Assistant Attorney General heading this office must do so without regard to political pressure. The duty is to ensure that the laws and Constitution of the United States are faithfully executed. Legal opinions must be founded on law, not politics.

I would note that this office has not had a Senate confirmed Assistant Attorney General since Jack Goldsmith, confirmed in October 2003, held office. Upon his departure, President Bush nominated Steven G. Bradbury in June 2005, to fill the vacancy. Mr. Bradbury's hearing was October 6, 2005, and

he was reported out on November 3, 2005. Mr. Bradbury waited more than three years for Senate approval, which never came. President Obama's first nominee for this position was Dawn Elizabeth Johnsen. Her nomination was controversial, and was ultimately withdrawn by the President on April 12, 2010.

The third office for which we are considering a nominee is the Bureau of Justice Assistance, a component of the Office of Justice Programs within the United States Department of Justice. I will not outline the important responsibilities of this office in my remarks now. However, I would emphasize that the policy, programs and planning which this office administers, must be accomplished in a non-partisan fashion. This office supports law enforcement and our nation's criminal justice system. It is essential that this office promote local control of law enforcement and that it fairly and efficiently administers the various grant programs within its jurisdiction.

Mr. Chairman, I will not repeat the biographical information on our nominees. I found it interesting that the nominees share some common ground. Two of the nominees, Ms. Seitz and Ms. O'Donnell graduated from the same law school. Ms. Seitz and Mr. Verrilli each clerked on the same courts; and both clerked for Justice Brennan. I commend each of the nominees for their prior public service and for their willingness to serve again. I ask unanimous consent that the balance of my statement be entered into the record. I look forward to reviewing the testimony.

Donald B. Verrilli, Jr., is nominated to be Solicitor General of the United States. Mr. Verrilli graduated from Yale University in 1979, and then from Columbia University School of Law in 1983. Upon graduation from law school, Mr. Verrilli clerked for Judge Wright on the U.S. Court of Appeals for the D.C. Circuit. He went on to clerk for Justice Brennan on the Supreme Court of the United States. In 1986, Mr. Verrilli began working as an Associate at Ennie Friedman & Bersoff, a small litigation firm in Washington, D.C. He provided counsel and litigation advice to one of the

firm's principal clients. He also worked on First Amendment litigation.

In 1988, Mr. Verrilli joined the D.C. office of Jenner & Block, where he worked on appellate and trial court matters. As his time at Jenner & Block progressed, Mr. Verrilli developed a more broad-based appellate practice while continuing to do telecommunications and technology related work.

Additionally, he took increasing managerial responsibilities at the firm in the 1990's and led the recruitment efforts of Jenner & Block's D.C. office. Mr. Verrilli became a co-managing partner of the D.C. office in 1997, was elected to the firm's governing Policy Committee in 2001; served as Chair of the firm's Diversity Committee beginning in 2006; and served as co-chair of the firm's Supreme Court practice group from 2000 to 2009. During Mr. Verrilli's career in the private sector he dedicated a substantial amount of his time to pro bono work.

Beginning in 2009, Mr. Verrilli began serving as an Associate Deputy Attorney General where he played a supervisory role on behalf of the Deputy Attorney General with regard to the civil litigating components at the Department of Justice. In February of 2010, he moved to the Office of the White House Counsel where he worked on issues of separation of powers, including Congressional and other requests for documents and information. He also worked on other legal policy issues and monitored litigation matters.

Virginia A. Seitz is nominated to be an Assistant Attorney General, to head the Office of Legal Counsel at the United States Department of Justice. In addition to the duties I previously mentioned, this office has a number of critical functions. All executive orders and proclamations proposed to be issued by the President are reviewed by the Office of Legal Counsel for form and legality, as are various other matters that require the President's formal approval. In addition to serving as, in effect, outside counsel for the other agencies of the Executive Branch, the Office of Legal Counsel

also plays a special role within the Department itself. It reviews all proposed orders of the Attorney General and all regulations requiring the Attorney General's approval. It also performs a variety of special assignments referred by the Attorney General or the Deputy Attorney General.

Ms. Seitz graduated from Duke University in 1978, and then was a Rhodes Scholar at Oxford University, receiving a degree in 1980. She received her J.D. degree in 1985, graduating first in class from the University at Buffalo Law School, The State University of New York. Following graduation, Ms. Seitz clerked for the Honorable Harry T. Edwards of the D.C. Circuit Court of Appeals. Afterwards, she clerked for Justice Brennan, Supreme Court of the United States.

In 1987, Ms. Seitz joined Bredhoff & Kaiser as an Associate. She remained with the firm until 1997, becoming a Partner in 1993. Her practice involved representation of labor unions, multiemployer health and retirement funds, and

individuals. She litigated district courts, the courts of appeals and the Supreme Court. Since 1987, Ms. Seitz has also served as a primary outside counsel to the Major League Baseball Players Association.

Ms. Seitz was appointed to the Board of the Office of Compliance in 1995 as a part-time special government employee. As a member of the first Board, her responsibilities included drafting regulations that applied virtually all major labor and employment laws to the legislative branch. The Board also served as an adjudicatory body for complaints brought by legislative employees under the Congressional Accountability Act.

In 1998, Ms. Seitz moved to Sidley Austin LLP, where she continued to work on matters involving the representation of labor unions and the Major League Baseball Players Association. She also expanded her practice to include general appellate litigation, representing corporations, nonprofit associations, and state or government entities.

Her pro bono work at Sidley has focused on civil rights issues and the representation of associations and non-profits.

Denise Ellen O'Donnell is nominated to be Director of the Bureau of Justice Assistance, a component of the Office of Justice Programs within the United States Department of Justice. Ms. O'Donnell graduated from Canisius College in 1968 and then a M.S.W. degree from State University of New York at Buffalo in 1973. Between 1968 and 1978, she worked first as a caseworker and then as a social worker with a variety of agencies including the Erie County Department of Social Services, New York City Department of Social Services, Catholic Charities of Buffalo, Child & Family Services, and the West Side Counseling Center of Buffalo, New York.

Ms. O'Donnell received her J.D. degree in 1982 from the University at Buffalo Law School, The State University of New York. After graduation from law school, she served as a

clerk to the late Honorable M. Delores Denman of the New York State Appellate Division, Fourth Department from 1982 to 1985. Upon completion of her clerkship, Ms. O'Donnell was hired by the United States Attorney's Office for the Western District of New York as an Assistant U.S. Attorney. There she handled Federal criminal and civil cases including tort, administrative law, federal program fraud, immigration, bankruptcy and asset forfeiture cases.

Ms. O'Donnell served as Chief of Appeals from 1990 to 1993. She also served as a Team Leader for the Evaluation and Review Staff of the Executive Office for United States Attorneys, which evaluated performance of the U.S. Attorneys Offices. In 1993 she was promoted to be First Assistant U.S. Attorney. In 1997, President Clinton appointed her, after Senate confirmation, to be United States Attorney for the Western District of New York. She served as United States Attorney until 2001.

Ms. O'Donnell joined the law firm of Hodgson Russ LLP in 2001 as a Partner in the Litigation Practice Group. While there, she concentrated on white-collar defense, health care law, civil fraud and false claims act litigation, and corporate ethics and compliance.

Ms. O'Donnell ran unsuccessfully to be the Democratic candidate for New York State Attorney General in 2006. She then worked on Eliot Spitzer's gubernatorial campaign as a Criminal Justice and Homeland Security Advisor. Shortly after his victory, she joined the Spitzer administration as Commissioner of the New York State Division of Criminal Justice Services (DCJS).

At DCJS, she was responsible for the administration of a \$64 million operating budget and oversaw a multi-service criminal justice agency with responsibility for a number of programs.

In January 2009, Governor David Patterson appointed Ms. O'Donnell as Deputy Secretary for Public Safety where she was responsible for a portfolio of twelve public safety agencies with a workforce of 42,000 employees. She resigned as Deputy Secretary on February 25, 2010 following reports of alleged misconduct by Paterson and members of his administration. Since leaving State Government, she has participated in several *pro bono* projects.

If confirmed, Ms. O'Donnell will head the Bureau of Justice Assistance ("BJA"), a component of the Office of Justice Programs within the United States Department of Justice. According to its website, BJA supports law enforcement, courts, corrections, treatment, victim services, technology, and prevention initiatives that strengthen the nation's criminal justice system.

BJA provides leadership, services, and funding to America's communities by Emphasizing local control; Building

relationships in the field; Provide training and technical assistance in support of efforts to prevent crime, drug abuse, and violence at the national, state, and local levels; Developing collaborations and partnerships; Promoting capacity building through planning; Streamlining the administration of grants; Increasing training and technical assistance; Creating accountability of projects; Encouraging innovation; and Communicating the value of justice efforts to decision makers at every level.

BJA has three primary components: Policy, Programs, and Planning. The Policy Office provides national leadership in criminal justice policy, training, and technical assistance to further the administration of justice. It also acts as a liaison to national organizations that partner with BJA to set policy and help disseminate information on best and promising practices. The Programs Office coordinates and administers all state and local grant programs and acts as BJA's direct line of communication to states, territories, and tribal governments by providing assistance and coordinating

resources. The Planning Office coordinates the planning, communications, and budget formulation and execution; provides overall BJA-wide coordination; and supports streamlining efforts.



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March 29, 2011

The Honorable Patrick J. Leahy  
 Chairman  
 United States Senate Committee on the Judiciary  
 224 Dirksen Senate Office Building  
 Washington, D.C. 20510

The Honorable Charles E. Grassley  
 Ranking Member  
 United States Senate Committee on the Judiciary  
 224 Dirksen Senate Office Building  
 Washington, D.C. 20510

Re: Nomination of Virginia A. Seitz

Dear Chairman Leahy and Ranking Member Grassley:

I write to support the nomination of Virginia A. Seitz to be the Assistant Attorney General for the Office of Legal Counsel. I have worked closely with Virginia for more than a decade, addressing a wide variety of legal questions in litigation and in counseling clients. Based on that extensive experience, I am confident that Virginia will approach the duties of this office with intelligence, fairness, and a non-partisan commitment to following the law as written in the Constitution and enacted by Congress.

As the other letters submitted to the Committee make clear, there is no question of Virginia's intellectual merit and legal acumen. She is a brilliant lawyer with a quick mind and a deep knowledge of the Constitution and American history. In any gathering of academics or lawyers, Virginia's genius stands out.

I believe that two other attributes provide equally compelling reasons for the Committee (and the full Senate) to confirm Virginia's nomination. First, Virginia is non-partisan in her approach to the law. Virginia's natural instinct is to follow the text of a law or regulation, applying past precedents fairly, and reasoning to a conclusion without bias formed by her personal policy preferences. There is no lawyer who is more objective in her judgments or less motivated by a desire to see her political "team" win a point. For this reason, clients and other

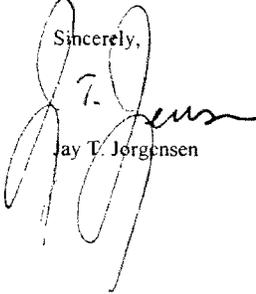


The Honorable Patrick J. Leahy  
The Honorable Charles E. Grassley  
March 29, 2011  
Page 2

lawyers commonly seek out Virginia to assist them in issues that could be considered both “conservative” and “liberal.”

Second, Virginia is one of the most modest and humble people I have known. She is always willing to consider arguments that are contrary to her initial views and to adopt new viewpoints based on their merits. She unfailingly treats the arguments of colleagues and opponents with open-minded respect. As a result, she is uniquely qualified to fill a position that involves providing the Administration with advice on disputed and difficult legal questions.

In sum, while I often disagree with the policy judgments of the Administration, I believe that Virginia is exceptionally well suited to serve as the Assistant Attorney General for OLC and urge you and your colleagues to support her nomination.

Sincerely,  
  
Jay T. Jorgensen

**KIRKLAND & ELLIS LLP**

AND AFFILIATED PARTNERSHIPS

655 Fifteenth Street, N.W.  
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Christopher Landau  
To Call Writer Directly:  
(202) 879-5087  
clandau@kirkland.com

JAN 21 '11 AM 11:25

January 12, 2011

The Hon. Patrick J. Leahy  
Chairman  
Senate Committee on the Judiciary  
Washington, DC 20510

The Hon. Charles E. Grassley  
Ranking Member  
Senate Committee on the Judiciary  
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Grassley:

I write this letter in enthusiastic support of the President's nomination of Virginia Seitz as Assistant Attorney General for the Office of Legal Counsel.

Virginia is a true "lawyer's lawyer," and perfectly suited for this very law-intensive position. She has practiced law at the highest levels for more than two decades, representing a wide variety of clients in a wide variety of courts on a wide variety of issues. As an appellate specialist, she has honed the art of getting up to speed quickly on any legal issue, and piercing to the very heart of it. Virginia has eminently sound judgment tempered by years of experience. She both knows and respects the limits of the law.

I can attest that Virginia is held in very high regard by her peers in the appellate legal community—including those of us who may approach the world from a different political perspective. She understands the difference between law and politics, and I am confident that she would not lose sight of that critical distinction in providing legal advice to the Executive Branch.

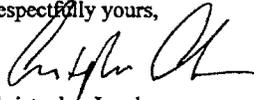
I should add that Virginia is an exceptionally nice and gracious person. I am sure that she would develop the best of personal and professional relations within the office itself as well as throughout the Department of Justice and Executive Branch and with the Congress. I very much hope that this nomination will bring an end to the longstanding standoff over this position -- if there's anyone whom everyone should agree is well qualified to head OLC, it is Virginia Seitz.

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**KIRKLAND & ELLIS LLP**

January 12, 2011  
Page 2

Respectfully yours,

A handwritten signature in black ink, appearing to read "Chris Landau", written in a cursive style.

Christopher Landau  
Former law clerk, Justice Clarence Thomas (1991-92)  
Former law clerk, Justice Antonin Scalia (1990-91)  
Former law clerk, OLC (1989)

**Statement of Senator Joseph Lieberman  
Regarding the Nomination for Donald B. Verrilli, Jr.  
Solicitor General of the United States, Department of Justice  
March 30, 2011**

Thank you, Chairman Leahy and Ranking Member Sessions, for allowing me to offer this statement in support of Donald B. Verrilli, Jr.'s nomination to serve as Solicitor General of the United States. Don Verrilli and his family have contributed generously to the Wilton, Connecticut community, the state of Connecticut, and our nation more broadly and I am pleased to offer this statement of support for his pending nomination.

I commend President Obama's decision to nominate Mr. Verrilli to serve as United States Solicitor General. With over three decades of legal experience, Don Verrilli's legal acumen, long career of devoted public service, and distinguished career in private legal practice should make him an ideal candidate for the important position of representing the United States Government before the United States Supreme Court.

Don Verrilli's extensive experience arguing cases before both the U.S. Supreme Court and the U.S. Court of Appeals make him a unique candidate to be what many call the Tenth Justice. Having participated in over 100 cases before the Supreme Court—including arguing twelve cases to date himself—Mr. Verrilli has demonstrated his legal expertise before our nation's highest court. Two of the cases he argued were particularly notable in the area of defendants' rights. In addition to the cases he argued before the U.S. Supreme Court, Mr. Verrilli has participated in over 90 cases before the U.S. Court of Appeals and state supreme courts, arguing over 30 of those appeals himself.

In his current job as Deputy Counsel to the President and his work at the Department of Justice as an Associate Deputy Attorney General, Mr. Verrilli has operated and thrived at the

highest levels of government. He has also had a distinguished career in private practice, having spent more than two decades as a litigator in the Washington offices of Jenner & Block. In addition to focusing his private practice on First Amendment issues, telecommunications, and intellectual property law, Mr. Verrilli also devoted much of his time to *pro bono* work, including several death penalty cases.

Don Verrilli's education and clerkships were early signs of his future success. He graduated from Yale University with a Bachelors of Arts degree and went on to earn a law degree from Columbia University, where he was a Kent Scholar and Editor-in-Chief of the *Columbia Law Review*. He went on to hold two federal clerkships, first as a law clerk to Judge J. Skelly Wright of the U.S. Court of Appeals for the D.C. Circuit and later as a clerk for Supreme Court Justice William J. Brennan.

I am pleased that Don Verrilli's nomination is proceeding through the confirmation process, and I look forward to working with you, Chairman Leahy and Ranking Member Sessions, and the rest of our Senate colleagues to bring Mr. Verrilli's nomination on the Senate floor as soon as possible.

Thank you.



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 WASHINGTON, D.C.

February 9, 2011

The Honorable Patrick J. Leahy  
 Chairman  
 United States Senate Committee on the Judiciary  
 224 Dirksen Senate Office Building  
 Washington, D.C. 20510

The Honorable Charles E. Grassley  
 Ranking Member  
 United States Senate Committee on the Judiciary  
 224 Dirksen Senate Office Building  
 Washington, D.C. 20510

Re: Nomination of Virginia A. Seitz to be Assistant Attorney General,  
 Office of Legal Counsel

Dear Chairman Leahy and Ranking Member Grassley:

I write in strong support of the nomination of Virginia Seitz to serve as Assistant Attorney General for the Office of Legal Counsel (OLC) at the Department of Justice. I had the privilege of serving at the Justice Department from 2002 through 2007 in a variety of positions, including as Assistant Attorney General for the Civil Division, as Principal Deputy Associate Attorney General, as Acting Associate Attorney General, and as Acting Attorney General. I have also had the privilege of working closely with the nominee, both as fellow law clerks at the United States Court of Appeals for the D.C. Circuit in 1985 and 1986 and again as law firm partners in private practice for approximately eight years, continuing to this day. I believe the President has made an inspired choice.

As you know, OLC is one of the most important offices at the Justice Department. The Attorney General has delegated to the Assistant Attorney General who heads OLC the responsibility to provide legal advice to the President and to departments and agencies of the Executive Branch. The Assistant Attorney General is further authorized by the President to resolve legal disputes that arise among those departments and agencies. Many of the matters that land on the Assistant Attorney General's desk involve important, difficult, and unsettled issues of



Honorable Patrick J. Leahy, Chairman  
Honorable Charles E. Grassley, Ranking Member  
U.S. Senate Committee on the Judiciary  
February 9, 2011  
Page 2

law. Many of the decisions he or she makes will never be subjected to judicial review, making them effectively final. The person who serves in that position must have exceptional legal judgment and experience, rock-solid integrity, and a judicial and non-partisan temperament. Virginia possesses those qualities in abundance. Indeed, I am not aware of anyone who knows and has worked with Virginia who does not enthusiastically support her nomination.

Her legal experience is broad and her legal judgment is brilliant and widely sought. She has handled cases at every level of the federal judiciary and for an extraordinarily broad range of clients – including major corporations, labor unions, trade associations, State governments, Native American tribes, public interest organizations, and others. I have read countless briefs she has written, watched her argue in the United States Supreme Court, and when I've needed the best possible thinking on a particularly difficult legal issue, I've come to her office time and time again. I always learn from those experiences. Virginia has an unusually sophisticated understanding of the law and legal principles, and a way of relating particular doctrines and rules to the law's underlying methods and purposes that reflects not only her extensive knowledge, but also, and more fundamentally, a deep appreciation and respect for our distinctive legal tradition.

Moreover, in part because of her deep respect for the law, and more generally because integrity and candor are so deeply embedded in her character, I know that Virginia, if confirmed, will always give her honest and fully independent judgment on any question that comes before her at OLC, even if that judgment may prove unpopular or inconvenient in particular instances. It is truly unimaginable that Virginia would ever compromise her legal opinion for the sake of expedience or any political considerations. And that integrity is reflected not only in the way she acts on her judgments but also in the way she reaches them. She is demanding of herself, always thoughtful and rigorous, and her focus is at all times on "getting it right," an objective she never subordinates to vindicating a prior position, advancing an agenda, or scoring an easy point. She is always interested in hearing, understanding, and genuinely considering every perspective on an issue, and is always willing to re-examine and re-think her own conclusions in light of new information she has obtained or new ideas with which she's been presented. She is a role model for me and for many in the profession in this respect as in so many others.

Finally, Virginia's abilities, accomplishments, professionalism, and integrity are among the reasons she is so universally admired within the legal community, but they are not the only reasons. Her extraordinary capabilities are matched by extraordinary personal decency. Despite her skills and reputation, there is never even a flicker of arrogance in her interactions with others. She treats everyone with respect. She gives of herself generously. She has been a mentor to countless other attorneys. And she is a natural teacher, both directly and by example.



Honorable Patrick J. Leahy, Chairman  
Honorable Charles E. Grassley, Ranking Member  
U.S. Senate Committee on the Judiciary  
February 9, 2011  
Page 3

I believe that all these qualities will, if she is confirmed, make her a great Assistant Attorney General -- one to whom others in the government will readily look for guidance, one whose judgments will properly be accorded great respect, and one whose service will be in the best and highest traditions of the Department of Justice.

I appreciate the opportunity to express my views, and would be happy to elaborate upon them in any way if that would be of assistance to you, to the Committee, or to its staff.

Sincerely

A handwritten signature in black ink, appearing to read "Peter D. Keisler".

Peter D. Keisler



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February 7, 2011

The Honorable Patrick Leahy  
Chairman  
United States Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

The Honorable Charles Grassley  
Ranking Member  
United States Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Re: Nomination of Virginia A. Seitz

Dear Chairman Leahy and Ranking Member Grassley:

I write in support of the nomination of Virginia Seitz to be Assistant Attorney General, Office of Legal Counsel ("OLC"). I am familiar with Virginia Seitz's character and qualifications through our many years of work together on various matters as law partners at Sidley Austin LLP, where we work in nearly adjacent offices. I am familiar with the importance and requirements of OLC through my service in the Administration of President George W. Bush, where I served in the Office of Counsel to the President and as General Counsel on the staff of the National Security Council.

Virginia Seitz is eminently qualified to lead OLC. Her integrity and intelligence are unquestioned. Her personal and professional leadership skills are strong and deft. She has extensive experience in matters of first impression and high principle, including especially matters of Constitutional law. Her temperament and approach to the law are judicial: analytical, dispassionate, open-minded, and focused on established sources of law.

As reflected in my appearances before your Committee and elsewhere, I am strongly committed to a legal framework that supports robust counter-terrorism and other measures undertaken in furtherance of our national security, and I am proud of the work of the prior Administration in this area. Virginia Seitz has the most important qualification for any



Honorable Patrick Leahy, Chairman  
Honorable Charles Grassley, Ranking Member  
U.S. Senate Committee on the Judiciary  
February 7, 2011  
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government lawyer who works on these issues: the ability to distinguish between law and policy, to advise on law as it exists rather than as it might be, and to resist casting policy preferences as legal analysis when, as is often the case, legal sources provide limited guidance. Her work will be supported by a broad range of national security specialists throughout Government, as well as by several senior OLC lawyers who also worked in the prior Administration.

I also write as one who believes that the President profoundly erred in his choice of the prior nominee for this position. In contrast, Virginia Seitz clearly possesses the qualities needed to lead OLC, and without reservation I request that you and other Members of the Committee consent to her appointment.

Respectfully,

A handwritten signature in black ink, appearing to read "Richard Klingler", written over a horizontal line.

Richard Klingler

Maureen E. Mahoney  
Direct Dial: (202) 637-2250  
maureen.mahoney@lw.com

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**LATHAM & WATKINS LLP**

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February 11, 2011

**VIA FEDERAL EXPRESS**

The Honorable Patrick J. Leahy  
Chairman  
United States Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

The Honorable Charles E. Grassley  
Ranking Member  
United States Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Re: Nomination of Virginia Seitz

Dear Chairman Leahy and Ranking Member Grassley:

I am a Republican appellate lawyer who previously served as a law clerk to then-Associate Justice William Rehnquist and as a Deputy Solicitor General under Judge Kenneth Starr. Despite our political differences, I am an ardent admirer of Virginia Seitz, and strongly support her nomination to serve as the Assistant Attorney General for the Office of Legal Counsel.

Virginia is one of the leading lawyers in the appellate bar and is known for her sharp analytical ability, persuasive writing, and gracious demeanor. Over the years, I have worked with Virginia in a variety of settings: as co-counsel on Supreme Court cases, as opposing counsel, as moot court judges, and as members of the D.C. Circuit Advisory Committee on the Federal Rules of Appellate Procedure. We have also become friends. In every context, I have been impressed with her ability to see all sides of an issue and to exhibit the utmost collegiality. Virginia is not blinded by ideology; knows how to be assertive without being aggressive; and she can bridge differences with insight and diplomacy. She also belongs to that rare breed of lawyers who are both brilliant and exceedingly modest. And I think it is inconceivable that she would ever allow her own ambition to trump her legal judgment. Indeed, I think Virginia's sole political ambition is to serve the United States to the best of her ability.

These traits make Virginia ideally suited to lead the Office of Legal Counsel. She will provide strong intellectual leadership and work effectively to resolve disputes within the

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Page 2

LATHAM•WATKINS<sup>LLP</sup>

Executive Branch. She will also be an able guardian of the President's executive power. Virginia is exceptionally well qualified for this important office and I hope the Committee will confirm her swiftly.

Very truly yours,



Maureen E. Mahoney

cc: Jeremy Paris (by email)



## Major County Sheriffs' Association

1450 Duke Street, Suite 207, Alexandria, Virginia 22314

**President**  
 Sheriff Douglas C. Gillespie  
 Las Vegas Metropolitan Police Department  
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 Las Vegas NV 89101-2984  
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 702 363-2904 (fax)  
 dgillespie@mcsheriffs.com

**Vice President**  
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 Hennepin County Sheriff's Office  
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 612 348-4208 (fax)  
 rstanek@mcsheriffs.com

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 johnaube@mcsheriffs.com

**Secretary**  
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 alamberti@mcsheriffs.com

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**Associate Executive Director**  
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 mpoyner@mcsheriffs.com

January 21, 2011

Senator Pat Leahy, Chairman  
 Senator Charles Grassley, Ranking Member  
 United States Senate  
 Committee on the Judiciary  
 224 Dirksen Senate Office Building  
 Washington, DC 20510

Dear Senators Leahy and Grassley:

On behalf of the members of the Major County Sheriffs Association (MCSA), I am writing to you in support of Denise O'Donnell's nomination to be Director of the Bureau of Justice Assistance. After reviewing her long and distinguished career in criminal justice, it is our belief that Ms. O'Donnell would serve our country well in that capacity.

As I'm sure you are aware, Ms. O'Donnell's recent service as New York State Deputy Secretary for Public Safety involved the tremendous responsibility of overseeing 11 homeland security and criminal justice agencies. Prior to that time, Ms. O'Donnell served as Commissioner of the New York State Division of Criminal Justice Services, where she was known for her innovative collaboration with criminal justice agencies.

MCSA is a professional law enforcement association of elected sheriffs representing counties or parishes with 500,000 population or more. We are dedicated to preserving the highest integrity in law enforcement and the elected Office of the Sheriff. Our membership represents over 80 million Americans. Our members consider their partnership with BJA to be critically important. We look forward to working with Ms. O'Donnell in her capacity as Director.

If you would like additional information regarding our support of Ms. Denise O'Donnell's nomination to Director of the Bureau of Justice Assistance, please feel free to contact any of our Executive Board members.

Sincerely,

Douglas C. Gillespie, Sheriff

## JONES DAY

51 LOUISIANA AVENUE, N.W. • WASHINGTON, D.C. 20001-2113  
 TELEPHONE: (202) 879-3939 • FACSIMILE: (202) 628-1700

Direct Number: (202) 879-5464  
 jday@jonesday.com

February 7, 2011

The Honorable Patrick J. Leahy  
 Chairman  
 United States Senate Committee on the Judiciary  
 224 Dirksen Senate Office Building  
 Washington, DC 20510

The Honorable Charles E. Grassley  
 Ranking Member  
 United States Senate Committee on the Judiciary  
 224 Dirksen Senate Office Building  
 Washington, DC 20510

Re: Nomination of Virginia A. Seitz

Dear Chairman Leahy and Ranking Member Grassley:

I write in support of the nomination of Virginia Seitz to serve as the Assistant Attorney General, Office of Legal Counsel ("OLC"), in the United States Department of Justice. I enthusiastically recommend Virginia for this position.

I have known Virginia for over 15 years. She is a wonderful lawyer, and an even better person. She is smart, thoughtful, and creative. She is calm and measured. She is honest and trustworthy. She is kind and loyal and virtuous. Most importantly, Virginia has courage—a trait that I suspect she inherited from her father, a famous federal judge who was desegregating public schools in Delaware prior to *Brown v. Board of Education*.

I first got to know Virginia well in 1995 when we were both jointly appointed—by Majority Leader Bob Dole, Minority Leader Tom Daschle, Speaker Newt Gingrich, and Minority Leader Richard Gephardt—to the Board of Directors of the Office of Compliance of the United States Congress. This Board was responsible for implementing the Congressional Accountability Act of 1995—*i.e.*, setting up the Office; hiring its personnel; promulgating regulations to make eleven incorporated federal employment laws applicable to the Legislative Branch and its instrumentalities; supervising the administration of these laws; and hearing appeals from decisions made by administrative law judges. Virginia was a superb and knowledgeable colleague in each and every aspect of the Board's work.

Virginia's service on the Board of the Office of Compliance is particularly relevant to her qualifications for service as Assistant Attorney General of OLC. Since the Board's job was to make federal employment laws applicable to the Legislative Branch for the first time in our nation's history, the Board's work understandably met with great resistance from some

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The Honorable Patrick J. Leahy  
The Honorable Charles E. Grassley  
February 7, 2011  
Page 2

JONES DAY

employing offices and their representatives. But the Board was established as an “independent agency” within that Branch—with its members having protection against removal—so that it could carry out its duties effectively and without political compromise or interference. Virginia showed great respect for the “separation of powers” that the statute created; and she showed great courage in carrying out her duties, notwithstanding vigorous efforts to induce the Board to be lax in its implementation and to construe the statute narrowly. This knowledge and experience—learned in the trenches, and not just in a book—of the importance of separated and limited powers, subject to checks and balances, will serve Virginia well in carrying out her duties at OLC.

In carrying out her duties at the Board, Virginia also demonstrated terrific legal skills, excellent advocacy skills, and, most importantly, the capacity for open-minded reflection. Virginia was always extremely well-prepared for our meetings and discussions. She often persuaded me to change my mind on issues pending before us. And she listened carefully to me and the other members of the Board; and, when appropriate, she changed her mind on occasion as well. Equally important, when Virginia disagreed, she always expressed her views civilly and respectfully.

In the ten-year period after our service on the Board together, Virginia and I have remained in close touch, both professionally and personally. We moot court each other; we comment on each other’s draft briefs; and we debate legal and political issues with each other. We also regularly dine together and with our respective families. I have even allowed her to baby-sit for my beloved golden retriever. In all of these experiences, Virginia has proved time and time again that she is as trustworthy and virtuous as a person can be.

I should disclose that Virginia and I come from quite different ideological and political backgrounds, and we frequently disagree with each other. I therefore have no doubt that I will disagree with some if not many of the decisions that she likely will make at OLC. But I take comfort in knowing that she will consider all arguments and views with an open-mind and, even more importantly, that she will make decisions based on her understanding of the law and on her love of country, and not on the basis of partisanship or self-serving personal aggrandizement.

I would be pleased to answer any questions that you might have in considering her nomination.

Sincerely,



Glen D. Nager



ROBIN S. CONRAD  
EXECUTIVE VICE PRESIDENT

1615 H STREET, NW  
WASHINGTON, DC 20062-2000  
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rconrad@chamber.com

February 11, 2011

MARK  
2/11/11  
9:40

The Honorable Patrick J. Leahy  
Chairman  
Senate Committee on the Judiciary  
Washington, DC, 20510

The Honorable Charles E. Grassley  
Ranking Member  
Senate Committee on the Judiciary  
Washington, DC, 20510

Dear Chairman Leahy and Ranking Member Grassley:

I am writing on behalf of the National Chamber Litigation Center (NCLC) to support the President's nomination of Virginia Seitz as Assistant Attorney General for the Office of Legal Counsel. As the public policy law firm of the U.S. Chamber of Commerce, NCLC represents the Chamber in court on issues of national concern to the business community.

NCLC has worked with Virginia Seitz for many years in a number of capacities and on a variety of significant and complex legal issues. She is one of the most fair-minded and intellectually honest lawyers I know.

Virginia has authored *amicus* briefs and served as counsel of record for the Chamber in high-profile Supreme Court cases involving federal preemption of state laws that interfere with foreign policy (*American Insurance Association v. Low*), potential criminalization of corporate compliance with document retention policies (*Arthur Andersen v. U.S.*), and the proper standards for awarding punitive damages (*Exxon Shipping Co. v. Baker*). She is extraordinarily well-versed in the law. Her advice is always insightful and clear, and her briefs are always exceptionally well-written.

Virginia also has participated on a number of moot courts hosted by NCLC to help prepare lawyers for Supreme Court arguments in important business cases. In these strategy sessions I had the privilege of seeing Virginia's extraordinary legal mind

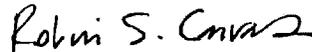
The Honorable Patrick J. Leahy  
The Honorable Charles E. Grassley  
February 12, 2011  
Page Two

at work. It doesn't take her long to get to the heart of the matter, whether the case is about the use of cost-benefit analysis under the Clean Water Act (*PSEG Fossil LLC v. Riverkeeper, Inc.*), the constitutionality of the honest services prong of the federal mail fraud statute (*Black v. U.S.* and *Skilling v. U.S.*), or the ability of courts to assert general jurisdiction over companies for merely placing goods into the stream of commerce (*Goodyear Luxembourg Tyres, S.A. v. Brown*). Virginia is a formidable moot court panclist: she probes; she listens; she probes even deeper. And no matter how evasive the answer, her follow-up questions are always asked with grace, impeccable manners and a consistently even temper.

The Virginia Seitz I know is smart, experienced, open-minded, and fair. These qualities alone make her particularly well-suited to head the Office of Legal Counsel.

I respectfully urge the Judiciary Committee to recommend Virginia Seitz's confirmation to the full Senate and that the Senate confirm her as Assistant Attorney General for the Office of Legal Counsel.

Sincerely,



Robin S. Conrad

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**NCJA** National Criminal Justice Association

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**PRESIDENT**  
 Kristen Mahoney†  
 Executive Director  
 Maryland Governor's Office  
 of Crime Control & Prevention

**VICE PRESIDENT**  
 Jack Curran†  
 Executive Director  
 IL Criminal Justice Information Authority

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 Wisconsin Office of Justice Assistance

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 Arizona Criminal Justice Commission

**Karlton Moore**  
 Executive Director  
 Ohio Office of Criminal Justice Services

**Jessie Smith**  
 Director  
 Division of Criminal Justice  
 CO Department of Public Safety

† denotes Executive Committee

April 27, 2011

The Honorable Patrick Leahy, Chairman  
 The Honorable Charles Grassley, Ranking member  
 Senate Committee on the Judiciary  
 224 Dirksen Senate Office Building  
 Washington, DC 20510

Dear Senators Leahy and Grassley:

We write in support of the nomination of Denise O'Donnell for Director, Bureau of Justice Assistance (BJA), Department of Justice. Members of the National Criminal Justice Association (NCJA) are the state, territorial and tribal chief executive officers of criminal justice agencies charged with managing federal, state, and tribal justice assistance resources, as well as practitioners from all components of the criminal and juvenile justice systems. As an association and as the representatives of their individual jurisdictions, our members work closely with the BJA.

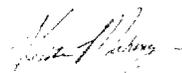
Ms. O'Donnell was Commissioner of the New York State Division of Criminal Justice Services from 2007-2010. As commissioner, she played a vital role in improving the capacity and effectiveness of the criminal justice system in New York. Using its Byrne Justice Assistance Grant (Byrne JAG) program grant and other federal and state resources, the agency supported initiatives across disciplines, including law enforcement, courts, corrections, prosecution, indigent defense, reentry, juvenile delinquency prevention, and crime victims' services. Commissioner O'Donnell engaged in statewide strategic planning to understand the needs of New York communities and used the agency's resources to balance the needs of the many segments of the criminal justice system.

Because of her work in New York, Commissioner O'Donnell is familiar with the mission, purpose, and practices of BJA. As a former grant recipient and consumer of the training and technical assistance provided by BJA, she will bring practical, common sense, customer-focused leadership to BJA.

Also, as commissioner, Ms. O'Donnell served on NCJA's Advisory Council, a forum for exchanging ideas and best practices with peers from the other states and territories. We know she is dedicated to deepening BJA's work with the states on the use of innovative and evidence-based practices, guided by statewide comprehensive strategic planning.

NCJA members strongly support Commissioner O'Donnell's nomination and urge her speedy confirmation.

Sincerely,



Kristen Mahoney  
 President



February 24, 2011

VIA FACSIMILE

The Honorable Patrick J. Leahy, Chair  
Senate Judiciary Committee  
224 Dirksen Senate Office Building  
Washington, D.C. 20510  
FAX (202) 224-9516

The Honorable Charles Grassley, Ranking Member  
Senate Judiciary Committee  
152 Dirksen Senate Office Building  
Washington, D.C. 20510  
FAX (202) 224-9102

Re: *Nomination of Virginia A. Seitz to be Assistant Attorney General for the Office of Legal Counsel, Department of Justice*

Dear Chairman Leahy and Ranking Member Grassley:

On behalf of the National Women's Law Center (the "Center"), an organization that has worked since 1972 to advance and protect women's legal rights, we write in strong support of the nomination of Virginia A. Seitz to be Assistant Attorney General for the Office of Legal Counsel in the Department of Justice.

The Office of Legal Counsel (OLC) has the critical role of providing legal advice to the President and the agencies of the Executive Branch. OLC addresses a broad array of legal issues, including the constitutional rights to equal protection and privacy, and other legal guarantees that are of the utmost importance to women. Given the important and complex legal questions that OLC is called upon to address, the Assistant Attorney General leading OLC must possess outstanding legal abilities, excellent judgment, open-mindedness and a willingness to consider all sides of a legal issue.

We believe that Virginia Seitz is superbly qualified for this position, and that she has all of these abilities in abundance. We have had the opportunity to observe Ms. Seitz's legal skills and approach to the law over a number of years. Ms. Seitz has served as pro bono counsel to the Center, particularly on issues related to educational equality. We sought her legal assistance because of her widespread reputation as a person of extraordinary legal abilities and sound judgment. We have been impressed by the exceptional quality of the representation that Ms. Seitz has provided to the Center, and we want especially to

National Women's Law Center to Chairman Leahy and Ranking Member Grassley  
February 24, 2011  
Page 2

acknowledge that, in accordance with her high professional standards, the Center as a pro bono client inevitably received her best and most conscientious efforts.

Ms. Seitz's legal talents, personal traits and temperament make her perfectly suited to lead OLC. We are confident that she will command the respect and confidence of the many people with whom she will deal, and will remain steadfast to the best tradition of independence in providing sound and grounded legal advice and analysis on every issue that comes before her. In addition, we note that, if approved by the Senate, Ms. Seitz would be the first woman confirmed to this important position in the Department of Justice. For all of these reasons, the Center offers its strong support of Virginia A. Seitz to be Assistant Attorney General for the Office of Legal Counsel and urges the Committee to approve her nomination quickly. Time is of the essence, particularly in light of the fact that this office has such an important mission and has been without a confirmed head for some time. If you have questions or if we can be of assistance, please contact us at (202) 588-5180.

Sincerely,



Nancy Duff Campbell  
Co-President



Marcia D. Greenberger  
Co-President

xc: Judiciary Committee

02/24/2011 1:28PM

**Opening Statement of Denise E. O'Donnell**  
**March 30, 2011**

Good Afternoon. Thank You Chairman Leahy, Ranking Member Grassley, and members of the Judiciary Committee for allowing me to present my testimony today. I also wish to thank Senator Whitehouse for chairing this hearing, and my own Senator, Senator Schumer for his very generous introduction.

I am honored that President Obama nominated me to be Director of the Bureau of Justice Assistance, and that Attorney General Holder has supported my nomination. If I am confirmed, I will do my best to demonstrate that I am worthy of their trust, and yours.

I appreciate the opportunity to introduce my family. First, my husband, the Honorable John O'Donnell, who is a Justice of the New York State Supreme Court, and who has served as an example for me, during his more than twenty years on the bench, of the importance of integrity, compassion and dedication in public service. I want to recognize another very special person, my son, Jack O'Donnell, who got his start in government working for one of the best, Senator Charles Schumer, and now is a partner in the government relations firm, Bolton St. John. Our daughter, Maura, her husband Kevin Corbett, and their beautiful four month old son, David O'Donnell Corbett, could only be here in spirit today. I am very proud of Maura, who is an Assistant United States Attorney in the Western District of New York, where I had the privilege of serving as United States Attorney and Assistant United States Attorney for over 16 years.

Were they alive, my parents, Ken & Shirley Mullane Beiter would be extremely proud today. They struggled during their lifetime to make sure that my five brothers and sisters and I had the best possible education, so that we would have opportunities they never had. Because of their sacrifice, I was the first member of my family to graduate from college, and each of my brothers and sisters followed, several of them going on to earn professional degrees and excelling in careers in law, health care and business.

My parents were very proud Americans. My father was a World War II veteran. They taught us about the importance of giving back, and I am forever grateful for the example they set for me. They instilled values that I have embraced throughout my life and professional career.

Thank you for the opportunity to testify before you today.

March 15, 2011

The Honorable Patrick J. Leahy,  
Chairman

The Honorable Charles E. Grassley,  
Ranking Member

United States Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Re: Nomination of Virginia A. Seitz as  
Assistant Attorney General for the Office of Legal Counsel

Dear Chairman Leahy and Ranking Member Grassley:

We urge this Committee to act on the nomination of Virginia A. Seitz to serve as Assistant Attorney General for the Office of Legal Counsel (OLC). All of us have had the privilege to serve in OLC, during either Democratic or Republican administrations. Some of us (denoted by asterisks below) support Virginia's confirmation; others of us do not believe we are in a position to judge her qualifications. All of us, however, believe it is important that OLC once again be led by a Senate-confirmed Assistant Attorney General.

As this Committee is aware, OLC serves a unique and critical role within the Executive Branch. By delegation, OLC exercises the Attorney General's authority under the Judiciary Act of 1789 to provide advice on questions of law to the President and executive agencies. Pursuant to the Attorney General's delegation, OLC's principal function is to provide controlling advice to Executive Branch officials on legal questions that are centrally important to the functioning of the Federal Government. Many of these questions are novel and complex—from the arcane to the most weighty and contentious legal questions of the day. Because many of these questions are ones of first impression that are unlikely to be addressed by the courts, OLC's determinations are often effectively the final word on the controlling law.

Given these responsibilities, it is critical that the Office be led by men and women who possess exceptional legal skills and judgment and who have the ability and integrity to render dispassionate advice on what are often extremely difficult legal questions. The confirmation process provides the Senate an important role in ensuring that the Office is headed by someone who possesses the necessary qualifications. Moreover, Senate confirmation and the resulting inter-branch approval can enhance OLC's ability to carry out its vital mission.

In addition, timely Senate action fosters continuity in an office that depends, more than most, upon stability. Even a very well-qualified new head of OLC is likely to face a daunting learning curve. The Office is steeped in precedents in many arcane areas of the law that few outside the Office encounter on a regular basis. Moreover, just as courts have developed

The Honorable Patrick J. Leahy  
The Honorable Charles E. Grassley  
March 15, 2011  
Page 2

sophisticated principles for determining whether issues are fit for judicial resolution, an OLC head must apply equally subtle, but often unwritten, principles for determining when and how requests for advice or opinions are properly framed, to avoid issuing unnecessarily broad or insufficiently informed decisions. The Vacancies Reform Act (VRA), however, places limits on the tenure of an acting officer that are designed to ensure the Senate has the opportunity to pass on the qualifications of nominees to Senate-confirmed posts. But when the Senate does not take advantage of that opportunity, and fails to act on a nominee, the VRA can become an impediment to continuity. Timely action on nominations to head OLC also ensures that the Office is best able to respond to the Executive Branch's often pressing demands for legal advice with the full complement of resources that Congress intended it to have.

Unfortunately, OLC has been led by confirmed Assistant Attorneys General only three of the past fifteen years. Given the significance of the responsibilities OLC shoulders, we believe this history of inaction is regrettable, and should not persist. We therefore join in urging the Committee to act promptly on Virginia's nomination, to ensure that OLC once again enjoys the benefits of a Senate-confirmed leader.

Sincerely,

David J. Barron\*  
Acting Assistant Attorney General 2009-2010

Michelle E. Boardman  
Deputy Assistant Attorney General 2005-2006

Steven G. Bradbury  
Acting Assistant Attorney General 2005-2007  
Principal Deputy Assistant Attorney General 2004-2009

Michael A. Carvin\*  
Deputy Assistant Attorney General 1987-1988

Walter E. Dellinger\*  
Assistant Attorney General 1993-1997

John P. Elwood  
Deputy Assistant Attorney General 2005-2009

Steven A. Engel  
Deputy Assistant Attorney General 2007-2009

The Honorable Patrick J. Leahy  
The Honorable Charles E. Grassley  
March 15, 2011  
Page 3

Timothy E. Flanigan  
Assistant Attorney General 1992-1993  
Principal Deputy Assistant Attorney General 1990-1992

Noel J. Francisco  
Deputy Assistant Attorney General 2003-2005

Jack L. Goldsmith\*  
Assistant Attorney General 2003-2004

Joseph R. Guerra\*  
Deputy Assistant Attorney General 1999-2001

Vicki C. Jackson\*  
Deputy Assistant Attorney General 2000-2001

Dawn E. Johnsen\*  
Acting Assistant Attorney General 1997-1998  
Deputy Assistant Attorney General 1993-1996

Joan L. Larsen  
Deputy Assistant Attorney General 2002-2003

Martin S. Lederman\*  
Deputy Assistant Attorney General 2009-2010

David G. Leitch\*  
Acting Deputy Assistant Attorney General 1991-1992  
Deputy Assistant Attorney General 1992-1993

Renée Lerner  
Deputy Assistant Attorney General from 2003-2005

Randolph D. Moss\*  
Assistant Attorney General 2000-2001  
Acting Assistant Attorney General 1998-2001  
Deputy Assistant Attorney General 1996-1998

Beth Nolan\*  
Deputy Assistant Attorney General 1996-1999

The Honorable Patrick J. Leahy  
The Honorable Charles E. Grassley  
March 15, 2011  
Page 4

Theodore B. Olson  
Assistant Attorney General 1981-1984

Elizabeth P. Papez  
Deputy Assistant Attorney General 2007-2009

Cornelia T. L. Pillard\*  
Deputy Assistant Attorney General 1998-2000

Jeannie S. Rhee\*  
Deputy Assistant Attorney General 2009-2011

Teresa Wynn Roseborough\*  
Deputy Assistant Attorney General 1994-1996

William M. Treanor  
Deputy Assistant Attorney General 1998-2001

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3513 Wentworth Drive  
Falls Church, VA 22044

February 9, 2011

The Honorable Patrick Leahy  
Chairman  
Senate Judiciary Committee  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

I am delighted to have the opportunity to write in support of the nomination of Virginia Seitz to be the Assistant Attorney General in charge of the Office of Legal Counsel at the U.S. Department of Justice. In my view, Ms. Seitz will be outstanding in this position and the Administration and the country will be exceptionally well served by her appointment.

Ms. Seitz was one of the few women Justice Brennan ever hired to serve as a law clerk. She and I clerked on the Court the same term, October Term 1986. I was a law clerk for Justice Scalia. We disagreed on most political and many legal questions. Nonetheless we became good friends in the course of the year. The reason was that we were always interested in what each other had to say because we were both interested above all in giving the best advice possible to our Justices.

Ms. Seitz and I have remained in touch professionally since our clerkships. In all our dealings, I have found Ms. Seitz to be an exceptionally talented and honest lawyer who is also an extraordinarily generous and kind person. That said I do not believe for a minute that her generosity or kindness will prevent her from being as tough as she needs to be in this job in advising the President, the Attorney General, and other departments and agencies diplomatically but firmly that they may not proceed with a proposed course of action that the law forbids. Equally importantly, I believe that the same integrity and strength of character will enable her to advise them that they may proceed with a proposed course of action that they believe is in the interests of the United States and that the law allows, even though it may expose them and her to potential criticism. These qualities, together with legal acumen, judgment, and a willingness to

make decisions, all of which Ms. Seitz has in abundance, are the central abilities the position calls for, and that make her so well suited to this appointment.

In short, I believe the President could not have chosen better for this very important position. I should add that although Ms. Seitz is married to one of my former co-clerks, Roy McLeese (who like Ms. Seitz is a political liberal and an exceptionally honest person), I do not write this letter out of friendship. I have been asked over the years to write in support of various nominations of people I know socially, but my threshold for these letters is very high, and in fact this is the first letter I can remember writing in support of the nomination of a Democrat. Rather I write it because I am convinced that Ms. Seitz's appointment will, in important ways, benefit the Office of Legal Counsel, the Department of Justice, and the United States. Finally, I would note that it has been too long since the Office has had a confirmed head, and that, the President having now chosen exceptionally well, it would be unfortunate if the Senate does not act promptly to confirm Ms. Seitz's nomination.

Sincerely,

A handwritten signature in cursive script, appearing to read "Lee Liberman Otis".

Lee Liberman Otis

cc: Senator Charles Grassley



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 (202) 736 8270

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 TOKYO  
 WASHINGTON, D.C.

January 14, 2011

The Honorable Patrick J. Leahy  
 Chairman  
 United States Senate Committee on the Judiciary  
 224 Dirksen Senate Office Building  
 Washington, D.C. 20510

The Honorable Charles E. Grassley  
 Ranking Member  
 United States Senate Committee on the Judiciary  
 224 Dirksen Senate Office Building  
 Washington, D.C. 20510

Re: Nomination of Virginia A. Seitz

Dear Chairman Leahy and Ranking Member Grassley:

I am writing in support of the President's nomination of Virginia Seitz to serve as the Assistant Attorney General in charge of the Office of Legal Counsel ("OLC") in the Department of Justice. I urge the Judiciary Committee promptly to recommend to the full Senate that she be confirmed and that the Senate in turn confirm her to that position. Based on my 13 years of experience working almost daily with Virginia, I am certain that she is the perfect choice to head OLC. She has the analytical and advocacy skills, integrity, and personal characteristics that OLC demands in its leader.

Virginia joined Sidley Austin in our Washington, D.C. office in 1998 as a partner. She had been a very successful partner at Bredhoff & Kaiser, a small boutique labor law firm in town. Virginia became an integral part of the firm's national appellate practice, which I had the privilege at the time to head. I also am the managing partner of Sidley's D.C. office and thus have had many opportunities to work closely with Virginia both as an appellate lawyer and as an advisor on a wide range of issues that a large law firm must confront, particularly on issues involving human resources.



Honorable Patrick J. Leahy, Chairman  
Honorable Charles E. Grassley, Ranking Member  
U.S. Senate Committee on the Judiciary  
January 14, 2011  
Page 2

In all of those roles, Virginia has demonstrated remarkable skills. She is a brilliant legal analyst. She understands very complicated issues of law, can condense them into understandable concepts and communicate their importance for solving a particular problem as effectively as any lawyer with whom I have ever worked. She has a prodigious knowledge of the law and a unique ability to compare legal principles from one area to another and derive compelling analogies. Her writing is elegant. She is concise and cogent. Every work product that she delivers is a real pleasure to read and is convincing.

During the past 13 years that we have worked together, we have almost always been lawyers' lawyers. Most cases we are asked to handle already have several lawyers who have been working on the case for years, sometimes for decades. In that role, we have been asked to represent parties on issues that range widely. We have worked on regulatory issues for large institutional clients of Sidley, such as ExxonMobil and CSX. By contrast, we have handled cases representing Indian Tribes or the National Congress of American Indians on very arcane issues of Native American law and sovereignty. She has proven again and again that she is a remarkably quick study. She can master any new subject in less time than almost any lawyer with whom I have worked and can discuss it with lawyers who are our co-counsel and who have had years of experience with the case, as if she had been practicing in that area for years. She offers the best of all traits – a fresh perspective on the issues coupled with a foundational understanding of the legal problem.

What may distinguish Virginia from most very talented lawyers is her relentless pursuit of the right answer. She does not simply tell a client what he or she wants to hear. She tells her clients and her partners what she thinks the law requires or permits and her conclusions are unerringly well supported and logical. On countless occasions over the past 13 years, Virginia has firmly but politely let me know that a particular argument or proposal that I have put forward on behalf of a client simply would not fly. She has a rare talent for being able to express her firmly held views without being confrontational and thereby being particularly persuasive.

Virginia is not only a consummate lawyer, but also she is a trusted advisor. In my role as managing partner, I face a number of issues, primarily involving human resources, and Virginia is the person to whom I turn for first-line advice whenever an issue arises. She is a valued member of the firm's Office of General Counsel. This position reflects the firm's confidence in her judgment and experience. I and all of my partners know that by following Virginia recommendations we will be able to navigate any issue with the maximum likelihood of a successful and satisfying outcome for all concerned. Her judgment is just that good.



Honorable Patrick J. Leahy, Chairman  
Honorable Charles E. Grassley, Ranking Member  
U.S. Senate Committee on the Judiciary  
January 14, 2011  
Page 3

Candidly, I write this letter against my personal self-interest. There is no one I would prefer to have available to work with me on the problems that Sidley's clients will confront in the years to come than Virginia Seitz. The President has wisely recognized that the values that make her irreplaceable for me make her ideal to lead the Office of Legal Counsel. There is no question that what is unfortunate for Sidley will be a wonderful benefit to our Nation. I hope the Committee and the entire Senate will recognize what a resource the President has identified and will confirm Ms. Seitz as soon as possible.

I would be happy to discuss Virginia's nomination with either of you or your staffs as you are deliberating over her confirmation.

Sincerely,

A handwritten signature in cursive script that reads "Carter G. Phillips".

Carter G. Phillips  
Managing Partner

Committee on the Judiciary  
United States Senate  
"Nominations"  
March 30, 2011

**SENATOR CHUCK SCHUMER**  
**INTRODUCTION OF DENISE O'DONNELL**  
**TO BE DIRECTOR, BUREAU OF JUSTICE ASSISTANCE, DOJ**

Mr. Chairman, thank you for this opportunity to introduce to the committee one of the most dedicated and talented public servants that the State of New York has to offer, Denise O'Donnell.

The job of managing the Bureau of Justice Assistance is like taking a thousand points of light and making sure that they all stay lit. Police officers, judges, victims of crime, counselors, and a host of others who are involved in the criminal justice system every day depend on the grants, and the expertise, that come from BJA to keep cops on the beat and communities safe. This job is even more challenging today, when everyone has to figure out how to do more with less.

I have known Denise and her wonderful family for many years. First, as the very accomplished and respected United States Attorney in Western New York, where we teamed up to launch Project Exile – a very successful effort to address the scourge of illegal crime guns. And then later in private practice, where we worked together on a number of issues related to New York's school boards. She went on to compete for public office and then serve – to universal acclaim – as the New York State Criminal Justice Commissioner.

Denise is deeply committed to public service and to the impartial and enlightened administration of justice. In short, there could be no one better suited to this job than Denise O'Donnell. Denise has served as a lawyer, prosecutor, executive-level manager, policymaker and professional social worker. She has dedicated her career to improving the judicial system in our state, and after she is confirmed she'll do the same thing for the country.

Denise is a native of Buffalo (Go Sabres!); she is the oldest of six children and a graduate of Mount Saint Joseph Academy High School. She was a member of the first class that graduated women in the formerly all male Jesuit school, Canisius College. She went on to earn a masters degree in social work and a JD, *summa cum laude*, from the State University of New York at Buffalo.

After joining the U.S. Attorney's office in the Western District of New York in 1985, she rose to become the First Assistant United States Attorney and then was appointed to be the United States Attorney for that office – the first woman to hold that position. During this time, she served as Vice Chair of the Attorney General's Advisory Committee. Among other significant cases, she helped to bring Timothy McVeigh to justice.

After she left office, she worked in one of the state's oldest law firms, Hodgson Russ LLP, before returning to public service as the Commissioner of the New York State Division of Criminal Justice Services. There, she oversaw a \$64 million operating budget, \$86 million in local assistance funding and \$67 million in Federal Criminal Justice Stimulus Funding. She ran programs too numerous to list, but they included the state's DNA databank, the sex offender registry, and state and local re-entry task forces.

She also held the post of Deputy Secretary for Public Safety, where she managed 12 public safety agencies and a budget of \$4.7 billion. She oversaw a portfolio of 11 homeland security and criminal justice agencies, including the Division of Criminal Justice Services, the Office of Homeland Security, the Division of the State Police and the Department of Corrections—40,000 employees, about 19 percent of the state's workforce. Denise now serves on the New York State Justice Task Force to Prevent Wrongful Convictions, and the Criminal Justice Council of New York City.

Mr. Chairman, the breadth of her experience is stunning, her reputation is sterling, and she will be a tremendous asset to the Department.

Thank you.

**Opening Statement of Virginia A. Seitz**  
**March 30, 2011**

Thank you, Senator Whitehouse. I appreciate the chance to introduce my family, starting with my husband, Roy McLeese – a federal prosecutor, a 25-year veteran of the Department of Justice, and the best imaginable husband, father, friend and lawyer. My son, Roy, a 10<sup>th</sup> grader at Field School, representing his sister Miranda, who is at the University of Chicago. My brother Collins Seitz, Jr., representing my other brothers Mark and Stephen from Tennessee and Colorado. And my niece Meredith, representing many nieces and nephews. Finally, our dear friend, David Fein, the US Attorney from CT, and his wife Liz.

I would like to start with some thank-yous:

To President Obama for the honor of this nomination,

To this committee for its consideration,

To Senators Coons and Carper for their kind introductions,

To the two great law firms where I've practiced, Bredhoff & Kaiser and Sidley Austin, and my friends there,

To those who were mentors and inspirations, particularly Judge Harry Edwards, Justice Brennan, Julia Penny Clark, Peter Keisler, Carter Phillips and Joe Guerra,

And, finally, to my absent parents whom I wish were here today.

Most of us feel our parents' influence profoundly, and I am no exception. My mother was a school teacher. I started my professional life as a teacher. My father was an esteemed judge, and I followed him into the law. The Office of Legal Counsel is tasked with providing the Executive Branch with candid, independent and principled advice based on the best understanding of what the law requires. I spent a good part of my life watching my father put aside personal views and engage in independent, principled legal analysis in cases large and small, in state and federal courts.

As has been mentioned here, my father was the judge who ordered the desegregation of the University of Delaware and public elementary and secondary schools in Delaware. Recognizing that he was bound by the Supreme Court's separate-but-equal decision, he politely questioned its reasoning, but decided only the question of whether the separate schools were equal, found they were not, and ordered the immediate admission of African-American students into the vastly superior white schools. At the time, his decisions were extraordinary and courageous – no judge had previously ordered an African-American student admitted to a white elementary or secondary school.

From conversations with him over the years, I know he never considered ruling otherwise. He believed that the rigorous application of legal principles required the result he reached, and he was passionate about the faithful application of the law. For my father, the foundation of our just and free society was the rule of law.

If I am confirmed, I will do my best to follow in his footsteps. I can make no deeper personal commitment. Thank you for considering my nomination.

• **Public**

March 30, 2011

Chairman Patrick J. Leahy  
United States Senate  
437 Russell Senate Office Building  
Washington, DC 20510

Ranking Member Chuck Grassley  
United States Senate  
135 Hart Senate Office Building  
Washington, DC 20510

*Re: Nomination of Donald B. Verrilli, Jr. to be Solicitor General of the United States*

Dear Chairman Leahy and Ranking Member Grassley:

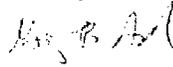
I write to you today in my personal capacity in support of the nomination of Donald B. Verrilli, Jr. to be Solicitor General of the United States. I have known Mr. Verrilli for approximately 17 years, and have worked with him on a variety of communications and copyright policy matters during that time. I believe that there is no one more qualified than Mr. Verrilli to hold the position of Solicitor General.

I am President of Public Knowledge, a non-profit organization that seeks to ensure an open and universally accessible communications system and balanced copyright and trademark laws that promote creativity, innovation and free speech. Public Knowledge has on occasion opposed legal and policy initiatives supported by the movie and record companies Mr. Verrilli represented in private practice.

Regardless, I believe that if confirmed, Mr. Verrilli will take a fair and unbiased approach towards copyright issues. First, as is true with any lawyer, Mr. Verrilli was a vigorous advocate for his clients' interests, fashioning arguments consistent with his (and his clients') interpretation of the law. This is not the same as being an advocate for a particular policy outcome regardless of what the law requires. Second, based on my interaction with Mr. Verrilli during his tenure in the White House Counsel's office, I have no reason to doubt that he gives his clients candid advice based on the law rather than on his personal beliefs.

Chairman Leahy and Ranking Member Grassley, I believe that the decision before you is simple. Don Verrilli has participated in 100 Supreme Court cases and has argued a dozen cases before the High Court. He has a long history of dedication both to public service and to justice. He is eminently qualified to be Solicitor General of the United States. This Committee should vote to advance his nomination to the full Senate, which should confirm him expeditiously.

Sincerely,



Gigi B. Sohn  
President

cc. Senate Judiciary Committee

February 10, 2011

**Via Hand Delivery**

The Honorable Patrick J. Leahy,  
Chairman  
United States Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

The Honorable Charles E. Grassley,  
Ranking Member  
United States Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

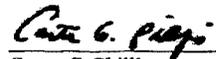
**Re: Nomination of Donald Verrilli as Solicitor General**

Dear Chairman Leahy and Ranking Member Grassley:

We are enclosing a revised letter for the nomination of Donald Verrilli, which includes a more up-to-date list of signatories. This replaces our letter of February 8, 2011, which your office should have already received. We apologize for the inconvenience and thank you for your consideration of this matter.

Sincerely,

  
Richard G. Taranto  
Farr & Taranto

  
Carter G. Phillips  
Sidley Austin LLP

Enclosure

February 10, 2011

**Via Hand Delivery**

The Honorable Patrick J. Leahy,  
Chairman  
United States Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

The Honorable Charles E. Grassley,  
Ranking Member  
United States Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

**Re: Nomination of Donald Verrilli as Solicitor General**

Dear Chairman Leahy and Ranking Member Grassley:

We write in enthusiastic support of the nomination of Don Verrilli to become the next Solicitor General of the United States. We write as lawyers who are deeply familiar both with the work of the Solicitor General and with Don's own work and character. Some of us have worked jointly with Don, some of us have appeared opposite him in cases, all of us have seen his work. We believe that Don is ideally suited to carry out the crucial tasks assigned to the Solicitor General, chiefly the representation of the United States in the Supreme Court, and to maintain the traditions of the office that the Solicitor General leads. We urge the Senate to confirm him as Solicitor General.

With experience representing a wide variety of clients, and several years serving the United States from within the government at its highest levels, Don is unusually experienced in the vast range of legal issues for which the Solicitor General is responsible on behalf of the United States. He is a quick study, careful listener, and acute judge of legal arguments. He is a masterful writer and oral advocate who knows the importance of clarity, candor, vigor, and responsiveness. The array of departments and agencies the Solicitor General represents, the Congress that enacts the laws being executed, and ultimately the Supreme Court in the performance of its functions all rely on these qualities in a Solicitor General, and all would be well served by Don Verrilli in that position.

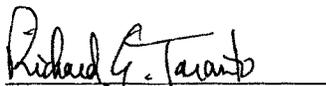
The Honorable Patrick J. Leahy  
The Honorable Charles E. Grassley  
February 10, 2011  
Page 2

As important, the successful functioning of the Solicitor General's office requires an ability to see the effects of particular arguments on the overall interests of the United States, both across agencies and over the long term. Shaping arguments to respect those interests, and to protect the special credibility the office has acquired over the decades of its existence, while maintaining clarity and force in presentations, demands the whole range of knowledge, intelligence, judgment, and other capacities that Don has in abundance. More generally, the rule of law depends on a consistent commitment to reason in the unfolding of legal principles. Don's approach to practicing law throughout his career – his meticulousness in understanding and presenting facts accurately and his insistence on coherently laying out reasons for the positions he is urging – proves beyond question that Don will protect and promote the rule of law.

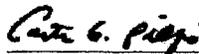
Finally, Don has a deeply ingrained habit of civility. Not only in court, but in private interactions, with co-counsel, colleagues, and lawyers who are adverse to his clients, Don maintains his equanimity and politeness and engages in calm, reason-based discussion. His character will serve the highest traditions of the Solicitor General's office.

We expect that the Senate, after full inquiry, will see all the virtues we know from first-hand experience that Don possesses. He is the consummate professional, and we hope that the Senate will confirm Don promptly to serve as the Solicitor General.

Sincerely,



Richard G. Taranto  
Farr & Taranto



Carter G. Phillips  
Sidley Austin LLP

The Honorable Patrick J. Leahy  
The Honorable Charles E. Grassley  
February 10, 2011  
Page 3

**THE FOLLOWING PEOPLE HAVE SIGNED ON TO THIS LETTER:**

Akin Gump Strauss Hauer & Feld: Patricia A. Millett

Arnold & Porter: Lisa S. Blatt

Covington & Burling: Jonathan Marcus, Robert Long

Crowell & Moring: Clifton S. Elgarten, Susan M. Hoffman

Farr & Taranto: Bartow Farr

Finnegan, Henderson, Farabow, Garrett & Dunner: Donald Dunner

Gibson Dunn & Crutcher: Theodore B. Olson, Miguel Estrada, Theodore J. Boutros Jr., Thomas G. Hungar

Goldstein, Howe & Russell: Thomas Goldstein, Amy Howe, Kevin Russell

Hogan Lovells: Catherine E. Stetson

Howrey: Jerrold Ganzfried

Jenner & Block: Paul Smith

Jones Day: Donald Ayer, Craig E. Stewart, Meir Feder

Kellogg Huber: David C. Frederick, Michael K. Kellogg, Aaron M. Panner

Kirkland & Ellis: Christopher Landau

King & Spalding: Paul Clement, Daryl Joseffer

Latham & Watkins: Gregory Garre, Richard P. Bress, Maureen E. Mahoney, Matthew Brill

Jonathan Massey

Mayer Brown: Stephen M. Shapiro, Andrew L. Frey, Andrew J. Pincus, Evan Tager, Charles Rothfeld, Lauren Rosenblum Goldman, David M. Gossett, Jeffrey W. Sarles



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 WASHINGTON, D.C.

February 7, 2011

The Honorable Patrick J. Leahy  
 Chairman  
 United States Senate Committee on the Judiciary  
 224 Dirksen Senate Office Building  
 Washington, D.C. 20510

The Honorable Charles E. Grassley  
 Ranking Member  
 United States Senate Committee on the Judiciary  
 224 Dirksen Senate Office Building  
 Washington, D.C. 20510

Re: Nomination of Virginia A. Seitz

Dear Chairman Leahy and Ranking Member Grassley:

I write to offer the warmest possible support for the President's nomination of Virginia A. Seitz to the position of Assistant Attorney General for the Office of Legal Counsel. I have known Virginia first as a colleague and now as a friend for several years. I am confident that this Administration could not have selected a more qualified, balanced, and capable nominee than Virginia.

Virginia's qualifications speak for themselves. As a Rhodes Scholar and law clerk to Supreme Court Justice William Brennan, Virginia has long walked with the legal elite. For more than two decades she has practiced appellate law with an unrivaled competence and precision. It has been my privilege to get to know Virginia since I joined Sidley Austin in 2007. We have worked together on several matters, and as office neighbors have had many discussions on matters legal and non-legal. I can personally attest to her temperance and caution; her rigorous adherence to the written law; her insistence on arguments grounded firmly in precedent; and her thoughtful and graceful advocacy. There is no lawyer at Sidley whom I would rather have on my side in an appellate courtroom, and know that, if confirmed, she will be sorely missed.

Virginia will be missed not only because of her legal acumen but the warmth and joy that she brings to the practice of law and the office every day. Virginia gives her own time to assist our younger lawyers interested in improving their own legal skills. She is humble, self-effacing,



The Honorable Patrick J. Leahy  
The Honorable Charles E. Grassley  
February 7, 2011  
Page 2

and has a tremendous capacity for humor. She has an encyclopedic knowledge of sports of all sorts (indeed, as I write this I can hear her in the hall breaking down last night's Superbowl). And the principal risk of stopping by her office to talk is being tempted with delicious baked goods.

My endorsement of the President's nomination flows not only from my appreciation for Virginia's personal qualities, but also the importance of the office to which she has been nominated. I had the privilege of serving President George W. Bush at the Department of Justice, first as Counsel to the Assistant Attorney General for Civil Rights, then working on Supreme Court nominations, and finally as a Deputy Associate Attorney General. During my years at the Department, I came to appreciate the unique and important role played by the Office of Legal Counsel. As legal advisor to the executive, OLC has the ability to harmonize inconsistent legal positions within and among agencies, to ensure that policies are pursued in a Constitutionally-sound manner, and to exercise its best judgment removed from the provincial policy interests of the particular agency or office seeking guidance. The decisions entrusted to OLC will be made regardless of whether it is headed by a Senate-confirmed Assistant Attorney General, or by an acting Assistant Attorney General selected by the President alone. Given its important functions, it is critical that OLC be led by someone with the full Constitutional imprimatur of nomination by the President and confirmation with the advice and consent of the Senate.

If Virginia is confirmed, Sidley's loss will be the United States' gain. I urge the Committee swiftly to recommend Virginia's nomination to the full Senate, and that the Senate confirm her.

Very truly yours,

A handwritten signature in black ink, appearing to read "G. D. Todd", written over a horizontal line.

Gordon D. Todd

GDT:taw

**Opening Statement of Donald B. Verrilli, Jr.**  
**March 30, 2011**

Thank you, Senator Whitehouse. Thank you, Senator Blumenthal for your generous introduction

The principal feeling I have today is one of intense gratitude.

I want first to express my gratitude to my wife, Gail Laster, for her love and support. Gail is a wonderful mother to our daughter Jordan, who begins her spring term as a freshman at Dartmouth this week, and at the same time Gail has achieved such great distinction in her career as a lawyer and public servant. I am also grateful that I can share this day with my parents. They could not be here in person, but I am pretty sure they are watching on c-span, and I want to take this opportunity to thank them for teaching me, through the example of their own lives, the paramount importance of dedication, integrity, and decency, and the lesson that so much more can be accomplished by bringing people together than by dividing them.

Finally, I want to express my profound gratitude to the President for the confidence he has shown in me by nominating me, to the Attorney General for his strong support, and to the Members of this Committee for holding this hearing and considering my nomination. I believe that it is our Constitution and our enduring faith in the rule of law that make this a truly exceptional nation. So I can think of no greater honor, and no more solemn responsibility, than to represent the United States before the Supreme Court – to participate every day in reaffirming our nation’s commitment to equal justice under law. And I can think of no more fulfilling professional experience than working with the extraordinary lawyers in the Solicitor General’s office, which many have rightly described as the finest law firm in America.

The position of Solicitor General is unique in that the office serves all three branches of government. Of course, the Solicitor General reports to the Attorney General and ultimately to the President as an executive officer assisting in the discharge of the President’s constitutional responsibility faithfully to execute the laws. But the Solicitor General also has special obligations to the Congress, and will (in all but the rarest cases) vigorously defend its statutes when their constitutionality is challenged. And the Solicitor General is, in a very special sense, an officer of the Supreme Court. The Court rightly expects that the Solicitor General will be scrupulous in respecting the principle of *stare decisis*, will exercise discretion wisely in making claims on the Court’s limited resources, and will insist on the highest standards of candor and professionalism in every representation made to the Court. Because of these multiple responsibilities, by long tradition, the Solicitor General has appropriately been afforded a large degree of independence.

If I am confirmed, I will do everything in my power to live up to the extraordinary example of professionalism, independence and integrity set by Rex Lee, Seth Waxman, Ted Olson and the other Solicitors General who have served with such distinction during my career as a lawyer, as well as their many illustrious predecessors. I understand that this is what our commitment to the rule of law requires, and I am humbled by the prospect of continuing the traditions of the Office. I look forward to the Committee’s questions. Thank you.

1875 Pennsylvania Avenue, NW  
Washington, DC 20006

March 17, 2011

*By Hand Delivery*

The Honorable Patrick J. Leahy, Chairman  
The Honorable Charles Grassley, Ranking Member  
United States Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Re: Nomination of Donald B. Verrilli Jr. for the Position of Solicitor General

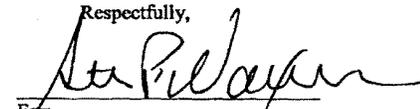
Dear Chairman Leahy and Ranking Member Grassley:

We have served as Solicitors General in the administrations of Presidents Ronald Reagan, George H.W. Bush, William Clinton, and George W. Bush. We write in strong support of the nomination of Donald Verrilli to become Solicitor General of the United States.

Some of us have worked alongside Mr. Verrilli as co-counsel; some of us have appeared opposite him in cases; all of us are familiar with his work, his demeanor, and his well-deserved reputation as a leading member of the Supreme Court bar. We believe Mr. Verrilli is ideally suited to carry out the crucial tasks assigned to the Solicitor General and to maintain the traditions of the Office the Solicitor General.

Mr. Verrilli's long experience representing a wide array of clients, in combination with his recent experience serving in senior positions in government, render him particularly well qualified to address the range of legal issues over which the Solicitor General is responsible on behalf of the United States. His well-deserved, stellar reputation as both a writer and oral advocate, and his deeply ingrained civility and dedication to the rule of law will well serve all three branches of government. We wholeheartedly endorse his confirmation.

Respectfully,



For:

Charles Fried (1985-1989)  
Kenneth W. Starr (1989-1993)  
Drew S. Days III (1993-1996)  
Walter E. Dellinger III (1996-1997)  
Seth P. Waxman (1997-2001)  
Theodore B. Olson (2001-2004)  
Paul D. Clement (2004-2008)  
Gregory G. Garre (2008-2009)